Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

GABRIEL SEYMOUR and ROBERT REID,

Petitioners,

vs.

STATE OF CONNECTICUT ELECTIONS ENFORCEMENT COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Connecticut Supreme Court unreasonably restrict the holding of this Court in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) to First Amendment protection only for anonymous pamphleteering relating to referenda and other issue-based ballot measures and not for political leaflets distributed during candidate political elections?

2. Is Section 9-333w of the General Statutes of Connecticut narrowly tailored to serve compelling state interests?

3. Even if persons who spend money on behalf of candidates for elective office (including the candidates themselves) may ordinarily be compelled to disclose their identities, may they be compelled to do so when the expenditures are *de minimis*?

4. Did the public disclosure by the Connecticut Elections Enforcement Commission of citizen complaints alleging violations of state law by candidates for elective office substantially violate the candidates' First, Fifth and Fourteenth Amendment rights, when there was no agency finding of probable cause and no agency hearing scheduled or held until after Election Day?

PARTIES TO PROCEEDING

The parties to this proceeding are all named in the caption.

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OPINIONS BELOW

The opinion of the State of Connecticut Supreme Court was handed down on December 19, 2000, and is reported as *Gabriel Seymour, et al. v. Elections Enforcement Commission*, 255 Conn. 78 (2000), 2000 WL 1806504 (Conn.). (A-1)

The Order denying petitioners' motion for reargument was entered on February 7, 2001, in the Connecticut Supreme Court under docket number SC 16167, and is unreported. A copy is reproduced in the Appendix. (A-33)

The decision of the Connecticut Superior Court affirming the administrative decision of the respondent Connecticut Elections Enforcement Commission was entered on December 16, 1998, under docket number CV 98 0579752, and is reported unofficially at 1998 WL 914364 (Conn. Super.). A copy is reproduced in the Appendix. (A-34)

The final administrative decision of the State Elections Enforcement Commission was filed on March 18, 1998, under File No. 97-252 and is reproduced in the Appendix. (A-41)

Also reproduced in the Appendix are the two press releases that formed the basis for the Commission's proceeding and subsequent appeals. (A-47 and A-50)

JURISDICTION

This petition is submitted pursuant to Supreme Court Rule 10(c) on the ground that the court of last resort of the State of Connecticut has decided important federal questions in a way that conflicts with relevant decisions of this Court.

On December 19, 2000 a closely-divided Supreme Court of Connecticut affirmed the decision of the respondent State Elections Enforcement Commission and upheld the constitutionality of a state statute challenged by petitioners as an abridgement of their right to free speech (Connecticut General Statutes §9-333w) and agency procedures that violated their federal free speech and due process rights. The order of the Supreme Court of Connecticut denying petitioners' motion for rehearing was entered on February 7, 2001. This petition is filed within 90 days of that order.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(i). Petitioners seek review by this Court of the final judgment rendered by the highest court of the State of Connecticut in which the validity of a statute of that state was and is drawn into question on the ground of its being repugnant to the Constitution of the United States (free speech), and where a right and privilege was and is specially claimed under the Constitution of the United States (free speech and due process).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant provisions of the United States Constitution involved in this case are as follows:

AMENDMENT I

Congress shall make no law . . . abridging the freedom of speech. . . .

AMENDMENT V

No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

AMENDMENT XIV

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The provisions of the Connecticut statute whose constitutionality is challenged in this case is as follows:

GENERAL STATUTES OF CONNECTICUT TITLE 9. ELECTIONS

Sec. 9-333w. Political advertising.

(a) No individual shall make or incur any expenditure with the cooperation of, at the request or suggestion of, or in consultation with any candidate, candidate committee or candidate's agent, and no candidate or committee shall make or incur any expenditure for any written, typed or other printed communication which promotes the success or defeat of any candidate's campaign for nomination at a primary or election or solicits funds to benefit any political party or committee unless such communication bears upon its face the words "paid for by" and the following: (1) In the case of such an individual, the name and address of such individual; (2) in the case of a committee other than a party committee, the name of the

committee and its campaign treasurer; or (3) in the case of a party committee, the name of the committee. . . .

STATEMENT OF THE CASE

This case challenges the validity of a Connecticut political campaign literature disclosure statute. Petitioners argue that the state statute is repugnant to the free speech provisions of the U.S. Constitution. The decision of the Connecticut Supreme Court upholding the statute directly conflicts with this Court's decision in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), and severely narrows its application.

The petition also challenges the state agency's deprivation of petitioners' free speech and due process rights by publicizing citizen complaints of alleged election law violations before any agency hearing on the merits or any finding of probable cause.

Proceedings Below

Petitioners, first-time candidates for local office in a 1997 municipal election, were found by the respondent, the Connecticut State Elections Enforcement Commission ("Commission"), to be in "technical" violation of Conn. Gen. Stat. § 9-333w ("the statute"), because they failed to place the words "paid for by," followed by their names and addresses, on two press releases they had circulated to local newspapers. The trial court affirmed the Commission's finding that petitioners had violated the campaign disclosure statutes and dismissed their appeal. Petitioners then appealed to the Connecticut Appellate Court, where the appeal was administratively transferred to the Connecticut Supreme Court, the highest Court in the State. After oral argument and briefing by the parties and by the Connecticut Civil Liberties Union Foundation as *amicus curiae* in support of petitioners, the Connecticut Supreme Court, in a 3-2 decision, affirmed the judgment of the trial court. *Seymour v. Elections Enforcement Commission*, 255 Conn. 78 (2000). In doing so, the majority narrowly circumscribed the scope and application of this Court's First Amendment decision in *McIntyre*.

Statement of Facts

Falls Village, Connecticut, is a small rural municipality located in the Town of Canaan, incorporated in 1739. The town is located in Litchfield County beside the Housatonic River in the foothills of the Berkshire Mountains. The town's population is 1,052, the second smallest town in the State of Connecticut.

In keeping with the traditional New England form of government, legislative authority for Falls Village is vested in the Town Meeting. Town affairs are administered by a three-person Board of Selectmen. Fiscal affairs are overseen by a Board of Finance. The town has local ordinances, but no charter. The Town of Canaan is in the 63rd Assembly District; the 30th State Senatorial District, with 14 other towns; and the 6th Congressional District. The Board of Selectmen consists of three elected members who serve two-year terms, one of whom by law must represent the minority party. As of June 30, 2000, Falls Village had 555 enrolled voters: 172 Democrats, 274 Republicans, 219 Unaffiliated, and 1 Other.

In 1997, petitioners — who had never before run for elective public office — were asked by a group of registered Republicans seeking a change in the town leadership, to run for the positions of First Selectman and Members of the Board of Selectmen, challenging the candidates endorsed by the town's official Republican party organization. During the election campaign, petitioners prepared two platform statements which petitioner Seymour typed on a personal computer and faxed to local newspapers with the intention that the statements be published. Although the press releases bore both of the plaintiffs' names and telephone numbers, as well as Seymour's fax number, they did not contain any indication of who had paid the minimal expenses for their preparation (*i.e.*, paper and faxing).[1]

As the election campaign moved into high gear in September 1997, individual organization members of the incumbent

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[1] The press releases are reproduced in the Appendix at A-47 and A-50.

Democrat and Republican parties filed complaints with the respondent State Elections Enforcement Commission alleging various technical violations of the state's election law disclosure requirements against the challengers, including the absence of "paid for by" attributions on the two press statements. The complaints were used as major campaign strategic attack weapons by the supporters of the party organization nominees against petitioners and their fellow reformers. The Commission's public disclosure of the citizen complaints against petitioners produced intense adverse publicity in the local press on as-yet unproven charges of election law violations, most of which were later dismissed or discontinued.

Two months after the election, on January 14, 1998, a Commission hearing officer conducted a contested evidentiary hearing on the complaints. A report was issued on March 3, 1998, finding that the petitioners' failure to list the identity and address of the paying party accompanied by the words "paid for by" on their campaign platform press releases constituted a "technical" violation of Conn. Gen. Stat. § 9-333w. The full Commission then adopted the hearing officer's report on March 18, 1998 — six months after the first publicizing of the complaint in the local press — and ordered the petitioners henceforth to comply with the statute. No penalties were imposed.

In the Connecticut Supreme Court, petitioners challenged the Commission's decision on the following constitutional grounds: (1) *free speech* challenge to the mandatory election law disclosure statute, both as applied and on its face, due to its broad application to every election in the state, from local school boards to the Governor and General Assembly; (2) *free speech* and *due process* challenge to the Commission's pre-election public disclosure of complaints against candidates, combined with a wholly unjustifiable delay in adjudication by the Commission until after election day, when the damage to the candidates had already been done; and (3) *separation of powers* challenge under the State Constitution to the appointment of the commissioners by the political leaders of both major parties in both houses of the legislature, assuring

protection of political "insiders" against citizen challengers to the status quo. Only the first two grounds (free speech and due process) are presented here for review by this Court under the Fourteenth Amendment.

Connecticut Elections Enforcement Commission

The respondent Connecticut Elections Enforcement Commission is a law enforcement agency with the power to impose penalties on violators and to seek judicial enforcement of its orders. (General Statutes Section 9-7(b)) Four of the five members of the EEC are appointed by officers of the Legislature: the President Pro Tem and Minority Leader of the Senate, and the Speaker and Minority Leader of the House. (Section 9-7(a)) The Governor appoints only one member to the Commission, who is outvoted 4-to-1. The Governor's appointee is expressly prohibited from affiliation with any political party.

Though the petitioners do not here raise their state law separation of powers argument, they wish nevertheless to explain how the state's executive and legislative branches interact in the nature and functioning of the Commission. The explanation is necessary to a clear understanding of why the federal constitutional issues, which the petitioners do raise, are important.

The make-up of the Connecticut Commission is similar to the original make-up of the Federal Election Commission, which was declared unconstitutional by the U.S. Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976). The Supreme Court found that the legislative appointment of the FEC violated the Separation of Powers:

> The Commission's enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to "take care that the Laws be faithfully executed." Art. II, § 3.

(*Id.* at p. 138)

Separation of powers is not a theoretical academic question. By assuring that all incumbent Members of the Legislature will be represented on the Connecticut Elections Enforcement Commission through appointments of Commissioners by their respective Republican and Democratic legislative leaders, the legislators have the built-in protection of a cooperative public agency that will prosecute trivial and technical enforcement actions against challengers to intimidate and harass them.

Most local boards of election in this country are staffed by political party loyalists who serve as eyes and ears for party officials and incumbent officeholders to alert them to signs of pre-primary and pre-election activities by potential opposition candidates. In some states this partisanship goes further, and uses the control of election machinery to create obstacles for would-be challengers through such measures as invalidating nominating petitions on procedural technicalities. In Connecticut, creation of a Legislature-dominated Elections Enforcement Commission has added a sophisticated layer of incumbent protection by facilitating the filing and publicizing of minor technical violations of the election law brought against citizen activists seeking to challenge entrenched local elected officials, such as occurred here. Legislative domination and control of the EEC has thereby undermined the democratic process by supporting local political organizations in the enforcement of complaints of technical violations of the election laws against challengers in order to intimidate them and other potential citizen activists from challenging the regular party organizations' candidates.

Raising of Federal Questions Below

The federal questions sought to be reviewed here were the principal subjects of both the 3-member majority opinion and the 2-member minority opinion in the Connecticut Supreme Court. They were initially raised at the very outset of the administrative proceeding before the state agency in 1997 when the question of disclosure was first raised. Petitioner Seymour

wrote to the respondent's staff attorney that the use of the disclosure statute was:

> . . . the equivalent of pre-publication censorship, preventing the free expression of opposing political views and impairing the right of citizens to assemble peaceably to challenge the existing political structure.
>
> These are cherished constitutional rights to which citizens of Falls Village have been publicly committed since 1774, two years before the Declaration of Independence, and Bob Reid and I are determined to preserve them at all costs.

(R42, Ex. 16 *id.* p. 5)

The Connecticut Supreme Court Majority Opinion

The opening sentence of the majority opinion of the Connecticut Supreme Court in *Seymour v. Elections Enforcement Commission*, 255 Conn. 78 (at page 80) (2000), acknowledges that the issues of constitutionality are at the core of this case:

> This case raises important questions regarding the constitutionality of Connecticut's political advertising disclosure laws and the commission created to enforce them.

The majority then describes the constitutional issues as follows (at pages 82-83):

> The plaintiffs' appeal from the judgment of the trial court raises the following issues: (1) whether the disclosure requirements of § *9-333w* violate the first and fourteenth amendments to the United States constitution, thereby rendering the statute void and unenforceable; (2) whether the alleged delay of any hearing or decision by the commission until after the election, coupled with the alleged assertions, by the commission, of the statutory violation by the plaintiffs, violated the plaintiffs' constitutional rights under the first, fifth and fourteenth amendments to the United States constitution; and (3) whether operational control of the commission's enforcement activities by a dominant majority of legislative political appointees,

> as provided by General Statutes §§ *9-7a* and *9-7b*, violates Connecticut's separation of powers doctrine. We conclude that: (1) § *9-333w* is constitutional; (2) the alleged delay did not violate the plaintiffs' constitutional rights; and (3) §§ *9-7a* and *9-7b* do not violate our separation of powers doctrine. Accordingly, we affirm the trial court's judgment.

The discussion of the issues presented on this petition then consumes twenty-two pages of the majority opinion (Opinion pages 83-105; Appendix, pages A-5–A-24).

The Connecticut Supreme Court Minority Opinion

The dissenting opinion consumes four pages (Opinion pages 109-113; Appendix A-28–A-32), and concentrates entirely on the *free speech* issue, summed up succinctly as follows:

> History teaches us that a stringent control of political debate on a minute formal point, without any relationship to the dangers of money controlling democratic government, presents a grave threat to our liberties.
>
> * * *
>
> Free elections and the vigorous debate essential to them are the essence of our republic. That is why freedom of speech was protected in the first amendment in 1791. Seymour's seeking public office against entrenched political parties in a small Connecticut town was entitled to protection from undue interference by the commission. I find the statute as applied violated that right.

(255 Conn. 78 at pp. 112-113)

REASONS FOR ALLOWANCE OF WRIT

The Connecticut Supreme Court, as state court of last resort, has decided important federal questions in a way that conflicts with relevant decisions of the United States Supreme Court.

The United States Supreme Court recognized in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) that anonymous

speech (*i.e.*, the type of speech penalized by the statute at issue here) holds an honored place in the history of American political discourse (at 357). While the majority of the Connecticut Supreme Court paid lip service to *McIntyre*, the practical effect of the decision below is to virtually nullify any right of anonymous speech for individuals connected with an election campaign. The decision of the Connecticut Supreme Court interprets *McIntyre* in the narrowest possible fashion and effectively limits that landmark case to its particular facts.

The majority opinion distinguished *McIntyre* on the ground that supporters of a candidate for political office have no reason to fear retaliation or social ostracism from public disclosure of their support:

> Candidates, by their very nature, hope to gain support by aligning themselves with particular issues. This process necessarily calls for one to identify a named candidate, with that candidate's public views. Thus, when candidate speech is involved, fears of "retaliation" or "social ostracism" are severely limited. A *per se* right to anonymity in this situation simply would be untenable.

Seymour, 225 Conn. at 100.

Anonymity, however, can be *even more important* to supporters of challengers in local elections than in statewide or national campaigns — municipal incumbent officeholders have a wide range of powers to punish individuals who challenge their control of the machinery of government: *e.g.* increased tax assessments, denials of permits, repeated visits by building and health inspectors, failure to maintain roads, public humiliation in town meetings — the opportunities are limitless. Fear of reprisals is one of the greatest weapons open to incumbents to protect their hold on municipal offices. The basic purpose behind the Bill of Rights is to protect individuals against exactly such retaliation.

This case presents fundamental constitutional issues affecting democratic process in every small town in America. Elections at this level are the most basic form of practical politics that exists. Voters have almost daily contact with their local

elected officials. Political party committees frequently join forces to protect incumbents and keep reform-minded challengers from weakening their hold on the machinery of government. Hand-picked candidates often change their own party enrollments in order to occupy offices required by statute to be divided between major parties. Licensing, inspections, zoning decisions, tax assessments and even road mending are available weapons for swift reprisal against citizens who challenge or offend incumbent town officials.[2] Shouting matches and personal abuse and humiliation sometimes take place at town meetings and public hearings. Grudges between neighbors can last for years — even generations.

The small town election is democracy in the raw, where protection of constitutional free speech is put to its severest test, and where strategic use of election rules and enforcement agencies like respondent can develop into absolute tyranny. Until one actually experiences local politics, it is difficult for most people to understand that local elections are far different from Presidential elections; gubernatorial races; congressional and even legislative contests. Those races bear no resemblance to the harsh realities of small town politics and the power of small town newspapers. This is democracy's frontier, where small incidents like the publicizing of a complaint alleging a minor violation filed with a state election law enforcement agency can determine success or failure at the polls.

The facts of this case present a classic example of how local political organizations can join forces to use the state election law technicalities to protect their hold on local offices (and town jobs, power, patronage, perks and related benefits that go with them).

That is why the constitutional issues presented by this case are so important and deserve review by this Court.

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[2] A septic tank violation filed by a town inspector can cost a home owner tens of thousands of dollars.

ARGUMENT

POINT I

SECTION 9-333w(a) IS VOID AS OVERBROAD UNDER THE FIRST AMENDMENT

Contrary to the implication of the majority opinion of the Connecticut Supreme Court, the right to full exercise of freedom of speech is not suspended during a candidate election. This "constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). When the State decides to place restrictions on free political speech through election law technicalities, the Courts must subject such statutes to "'exacting scrutiny'" and "uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *McIntyre*, 514 U.S. at 347 (citations omitted).

The majority's error below was to focus on disclosure requirements of the statute that it believed to be permissible (*i.e.*, solicitation of contributions) and to disregard the substantial number of contexts in which the application of the statute is plainly void. This was a direct violation of the doctrine of "overbreadth" which "reflects a constant of our free speech jurisprudence that claimants whose First Amendment rights are affected may challenge a statute not merely on the ground that its specific application to them is unconstitutional, but also that its application *is void in a substantial number of other contexts that arguably fall within its scope*." *Morse v. Republican Party of Va.*, 517 U.S. 186, 241-42 (1996) (Scalia, J. dissenting) (emphasis added.)[3] The following are examples of contexts in which the State has no compelling interest in curtailing free speech by requiring a "paid for by"

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[3] The majority in *Morse* also recognized the continued vitality of the overbreadth doctrine. *See Morse*, 517 U.S. at 229, n. 38 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)).

attribution, but which nonetheless fall within the broad sweep of Section 9-333w.[4]

1. The Statute is Overbroad Because It Applies to Expenditures by the Candidates Themselves

The State Supreme Court majority opinion found that Section 9-333w served a compelling state interest in "avoiding corruption that might result from campaign expenditures" *Seymour*, 255 Conn. at 88. Obviously, as a matter of common sense, this concern only comes into play when *someone else* expends money on a candidate's behalf, not where, as here, candidates *expend their own money*. Because the statute applies to "self funded" expenditures, where there is no risk of a *quid pro quo*, it is obviously overbroad.[5]

2. The Statute Applies to Negligible Expenditures

As the dissenting opinion noted, the statute here was interpreted to require disclosure regarding the "cost of three pieces of paper and the ink used in printing the releases and the cost (if any) of six local telephone calls — mere pennies." *Seymour*, 255 Conn. at 109. (McDonald, C.J., with Sullivan, J., dissenting.) There is no conceivable enforcement, informational, or corruption-combating interest in disclosing the source of such paltry sums.

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[4] To the extent these examples are based on plaintiffs' specific circumstances, they also show why the statute is unconstitutional as applied in this case.

[5] The majority opines that the attribution requirement is valid for "self-funded" campaigns because it "provides the commission with *another way* to ensure that campaign literature is funded, not from third parties, but from candidates themselves." *Seymour*, 255 Conn. at 90 (emphasis added.) The test, however, is whether a statute is "narrowly tailored" not whether it provides an additional, redundant enforcement weapon. Plainly, the same goal can be accomplished with a less restrictive statute applicable only to contributions by so-called "third-parties."

3. The Statute Applies to Non-Organization Candidates Subject to Harassment

The statute was applied in this case to reform-minded citizens challenging "business as usual" politics by entrenched politicians. Because reform challengers do not have the financial and logistical backing of the party organizations, and because they are often virtually alone in opposing the political powers that be, these reformers stand in the shoes of "minor political party candidates" who are "subject . . . to threats, harassment, or reprisals from either government officials or private parties." *Buckley v. Valeo*, 424 U.S. 1, 74 (1976). The Supreme Court has made clear that election laws should not be enforced in a way that will inhibit the exercise of the right of free political expression by such political outsiders.

4. The Statute Applies to Speech That Is Not Even Arguably False

The statute here is also overbroad because it places restrictions on speech which is "not even arguably false and misleading." *McIntyre*, 514 U.S. at 351. Plainly, the State has no legitimate interest in controlling or restricting citizens' access to the truth.

POINT II

DUE PROCESS BENEFITS THE ELECTORATE AS WELL AS THE CANDIDATES

The State Supreme Court majority gave short shrift to petitioners' argument that the *State* itself should not be permitted to mislead the electorate, by delaying resolution of often unfounded — but highly publicized — charges of campaign violations, many of which are dismissed after the election. (*Seymour*, *supra*, at *11-*12.) (A-22–A-24) Due process considerations require either that politically-motivated charges not be publicized until they are independently adopted by the agency based on a finding of probable cause; or that an agency hearing on the merits be held on an expedited basis — before election day.

In its opinion, the State Supreme Court majority emphasizes the *state's* right to protect the electorate by preventing candidates and other citizens from distributing misleading, false or inaccurate information. *Seymour*, 255 Conn. at 93 (noting that "during election campaigns . . . false statements, if credited, may have serious adverse consequences for the public at large.") (*quoting McIntyre*, 514 U.S. at 349.) However, *unfounded* charges against candidates present a much greater danger of misleading or misinforming the electorate, because they bear the stamp of government approval.[6]

CONCLUSION

This case underscores one of the most pervasive problems in America: the difficulty of encouraging more citizens to become involved in local politics and to overcome fear of reprisals by the established political powers. The majority opinion of the Connecticut Supreme Court, by encouraging entrenched political organizations to misuse election laws to punish reform-minded challengers and their supporters, can only generate more political alienation and apathy on the part of citizens. The three-Justice majority's failure to consider the realities of actual small town election process, or acknowledge the easy steps that could be taken to *prevent* repetition of the constitutional abuses present here,[7] warrants the

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[6] It is no answer to state — as the State Supreme Court majority does — that the statute provides for continuing investigations by the Commission "regardless of time frame." *Seymour*, 255 Conn. at 104. That is the very flaw which makes the statute unconstitutional under the First, Fifth and Fourteenth Amendments, by allowing investigations of unfounded charges to drag out past election day.

[7] In affirming the trial court's decision, the majority opinion of the Connecticut Supreme Court gives inadequate attention to the available simple steps that could be taken by the Commission and by the Legislature to remedy the constitutional problems. For example:

(a) Section 9-333w(a) could easily be amended to protect constitutional rights by adding an exemption for *self-funded candidate elections* and by setting *a reasonable minimum dollar amount for expenditures* that must be identified as to "paid by" sources (*e.g.*, $500 or $1,000 — not pennies, as in this case).

granting of the writ and review of that court's decision by the Supreme Court.

Dated: New Haven, Connecticut
May 1, 2001

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(b) Any inadequacy in common law causes of action for libel and fraud can be easily corrected by legislative passage of a criminal statute patterned on the Ohio law that provided grounds for the United States Supreme Court's decision in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995). This solution would be far less intrusive on valuable First Amendment freedoms than the present offending provisions of Connecticut's s section 9-333w.

The Connecticut Supreme Court — while professing to apply strict scrutiny — distinguished *McIntyre* in this latter regard, by stating that Ohio already had such a criminal statute while Connecticut did not; thus, in the court's view, no less restrictive alternative existed in this jurisdiction. (255 Conn. at p. 94) The Court thereby took the extraordinary (and, to petitioners' best knowledge, unprecedented) position that a state can satisfy strict scrutiny's least-restrictive-alternative requirement simply by declining to adopt one.

APPENDIX A

Connecticut Appellate Decisions

SEYMOUR v. ELECTIONS ENFORCEMENT COMM.,
255 Conn. 78 (2000)
___ A.2d ___

GABRIEL SEYMOUR ET AL. *v.* ELECTIONS ENFORCEMENT COMMISSION
(SC 16167)
Supreme Court of Connecticut

McDonald, C.J., and Borden, Norcott, Palmer and Sullivan, Js.

David R. Schaefer, with whom, on the brief, was *Whitney North Seymour, Jr.*, for the appellants (plaintiffs).

Eliot D. Prescott, assistant attorney general, with whom, on the brief, were *Richard Blumenthal*, attorney general, and *Carolyn K. Querijero*, assistant attorney general, for the appellee (defendant).

Martin B. Margulies and *Philip D. Tegeler* filed a brief for the Connecticut Civil Liberties Union Foundation as amicus curiae.

Opinion

NORCOTT, J.

This case raises important questions regarding the constitutionality of Connecticut's political advertising disclosure laws and the commission created to enforce them. After an evidentiary hearing, the defendant, the state elections enforcement commission (commission), found that the plaintiffs, Gabriel Seymour and Robert Reid, had violated certain campaign finance laws. The plaintiffs appealed from the decision of the commission to the trial court. The trial court affirmed the commission's finding that the plaintiffs had violated the campaign law in question and its order that they were henceforth to comply with the statute, and accordingly, dismissed

the plaintiffs' appeal. This appeal followed.[1] We affirm the judgment of the trial court.

The following facts are relevant to our disposition of this appeal. This case arises out of the plaintiffs' 1997 campaign for the position of first selectman and a position on the board of selectmen of Falls Village, respectively. On September 3, 1997, and again on September 12, 1997, the plaintiffs released statements to local newspapers with the intention that the statements be published. The plaintiffs prepared each statement on a personal computer and faxed the documents to at least three local newspapers. The expenses associated with the statements were shared equally by the plaintiffs. Although the statements contained both plaintiffs' names and telephone numbers, neither statement indicated who had paid for them.

On September 18, 1997, and again on October 8, 1997, James P. McGuire filed complaints[2] with the commission claiming that the plaintiffs had failed to include the "paid for by" attribution requirement, as mandated by General Statutes § 9-333w (a).[3] These complaints remained pending throughout

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[1] The plaintiffs appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to Practice Book § 65-1 and General Statutes § 51-199 (c).

[2] Collectively, these complaints have come to be known as the McGuire complaints. There is some confusion as to the actual dates that the complaints were filed. The other dates referred to, September 16, 1997, and October 2, 1997, are the dates listed on McGuire's affidavits. Those affidavits then were filed with the commission on September 18, 1997, and October 8, 1997.

An additional complaint also was lodged prior to the McGuire complaints. The DeMazza complaint, as it was known, eventually was discontinued after voluntary payment of a $100 penalty by a respondent, other than either plaintiff, and is not the subject of this appeal.

[3] General Statutes § 9-333w (a) provides: "No individual shall make or incur any expenditure with the cooperation of, at the request or suggestion of, or in consultation with any candidate, candidate committee or candidate's agent, and no candidate or committee shall make or incur any expenditure for any written, typed or other printed communication which promotes the success or defeat of any candidate's campaign for nomination

the duration of the campaign. On November 4, 1997, Seymour was elected first selectman, and Reid was unsuccessful in his bid for second selectman.[4]

On January 14, 1998, a commission hearing officer conducted a contested evidentiary hearing. A report was issued on March 3, 1998. The report stated that the plaintiffs' failure to list the identity and address of the paying party accompanied by the words "paid for by" constituted a "technical" violation of § 9-333w. The commission adopted the report of the hearing officer and ordered the plaintiffs henceforth to comply with the statute. The trial court dismissed the plaintiffs' appeal from the decision of the commission.

The plaintiffs' appeal from the judgment of the trial court raises the following issues: (1) whether the disclosure requirements of § 9-333w violate the first and fourteenth amendments to the United States constitution, thereby rendering the statute void and unenforceable; (2) whether the alleged delay of any hearing or decision by the commission until after the election, coupled with the alleged assertions, by the commission, of the statutory violation by the plaintiffs, violated the plaintiffs' constitutional rights under the first, fifth and fourteenth amendments to the United States constitution; and (3) whether operational control of the commission's enforcement activities by a dominant majority of legislative political appointees, as provided by General Statutes §§ 9-7a and 9-7b,[5] violates Connecticut's separation of powers doctrine.

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at a primary or election or solicits funds to benefit any political party or committee unless such communication bears upon its face the words 'paid for by' and the following: (1) In the case of such an individual, the name and address of such individual; (2) in the case of a committee other than a party committee, the name of the committee and its campaign treasurer; or (3) in the case of a party committee, the name of the committee."

[4] Reid actually tied his opponent in votes, but did not take office for reasons that are not relevant to this appeal.

[5] General Statutes § 9-7a (a) provides in relevant part: "There is established a State Elections Enforcement Commission to consist of five members, not more than two of whom shall be members of the same political party and at least one of whom shall not be affiliated with any political

We conclude that: (1) § 9-333w is constitutional; (2) the alleged delay did not violate the plaintiffs' constitutional rights; and (3) §§ 9-7a and 9-7b do not violate our separation of powers doctrine. Accordingly, we affirm the trial court's judgment.

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party. Of the members first appointed hereunder, one shall be appointed by the minority leader of the House of Representatives and shall hold office for a term of one year from July 1, 1974; one shall be appointed by the minority leader of the Senate and shall hold office for a term of three years from said July first; one shall be appointed by the speaker of the House of Representatives and shall hold office for a term of one year from said July first; one shall be appointed by the president pro tempore of the Senate and shall hold office for a term of three years from said July first, and one shall be appointed by the Governor, provided that such member shall not be affiliated with any political party, and shall hold office for a term of five years from said July first. . . ."

General Statutes § 9-7b (a) provides in relevant part: "The State Elections Enforcement Commission shall have the following duties and powers:

"(1) To make investigations on its own initiative or with respect to statements filed with the commission by the Secretary of the State or any town clerk, or upon written complaint under oath by any individual, with respect to alleged violations of any provision of the general statutes relating to any election or referendum, any primary held pursuant to section 9-423, 9-424, 9-425 or 9-464 or any primary held pursuant to a special act, and to hold hearings when the commission deems necessary to investigate violations of any provisions of the general statutes relating to any such election, primary or referendum, and for the purpose of such hearings the commission may administer oaths, examine witnesses and receive oral and documentary evidence, and shall have the power to subpoena witnesses under procedural rules the commission shall adopt, to compel their attendance and to require the production for examination of any books and papers which the commission deems relevant to any matter under investigation or in question. . . .

"(2) To levy a civil penalty. . . . The commission may levy a civil penalty against any person under subparagraph (A) or (B) of this subdivision only after giving the person an opportunity to be heard at a hearing conducted in accordance with sections 4-176e to 4-184, inclusive. . . ."

I

The essence of the first issue is whether the disclosure requirements set forth in § 9-333w unconstitutionally burden the plaintiffs' right to free speech. The United States Supreme Court has repeatedly held that political speech is at the nucleus of the protection afforded by the first amendment. "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' *Roth* v. *United States*, 354 U.S. 476, 484 [77 S.Ct. 1304, 1 L.Ed.2d 1498] (1957). Although First Amendment protections are not confined to 'the exposition of ideas,' *Winters* v. *New York*, 333 U.S. 507, 510 [68 S.Ct. 665, 92 L.Ed. 840] (1948), 'there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs . . . of course includ[ing] discussions of candidates. . . .' *Mills* v. *Alabama*, 384 U.S. 214, 218 [86 S.Ct. 1434, 16 L.Ed.2d 484] (1966). This no more than reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,' *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 [84 S.Ct. 710, 11 L.Ed.2d 686] (1964). In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in *Moniter Patriot Co.* v. *Roy*, 401 U.S. 265, 272 [91 S.Ct. 621, 28 L.Ed.2d 35] (1971), 'it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" *Buckley* v. *Valeo*, 424 U.S. 1, 14-15, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).

Political speech is given the highest level of scrutiny under our rubric of judicial review. "When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the

restriction only if it is narrowly tailored to serve an overriding state interest." *McIntyre* v. *Ohio Elections Commission*, 514 U.S. 334, 347, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995); see also *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 786, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). Because the statute at issue in the present case requires that certain information be included within the distributed material, i.e., the identity of the person paying for the distributed material, it necessarily regulates the content of speech. As a result, the limitation on political expression is subject to exacting scrutiny. See *Meyer* v. *Grant*, 486 U.S. 414, 420, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988).

The Supreme Court previously has "acknowledged that there are governmental interests sufficiently important to outweigh the possibility of infringement [upon the first amendment], particularly when the 'free functioning of our national institutions' is involved." *Buckley* v. *Valeo*, supra, 424 U.S. 66, quoting *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 97, 81 S.Ct. 1357, 6 L.Ed.2d 625 (1961). The court has noted that, "[d]espite the ritualistic ease with which we state this now-familiar [exacting scrutiny] standard, its announcement does not allow us to avoid the truly difficult issues involving the First Amendment. Perhaps foremost among these serious issues are cases that force us to reconcile our commitment to free speech with our commitment to other constitutional rights embodied in governmental proceedings." *Burson* v. *Freeman*, 504 U.S. 191, 198, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992). The present case requires such a reconciliation.

The statutory scheme at issue seeks to balance an individual's right to free speech with the public's interest in ensuring fair and honest elections. Although an individual's right to free speech is well known and widely publicized, the state's obligation to safeguard the electoral process is frequently neglected, although it, too, is of great import. Because of the critical role that elections play in our democratic society, the Supreme Court has recognized "that a State indisputably has a compelling interest in preserving the integrity of its election

process. . . . The Court thus has upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself. . . . In other words, it has recognized that a State has a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process." (Citations omitted; internal quotation marks omitted.) Id., 199. Indeed, "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer* v. *Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974); see also *Buckley* v. *American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999). It is with these two overriding, and sometimes competing, liberties in mind that we subject Connecticut's disclosure statute to a strict scrutiny evaluation.

The commission justifies its restriction with four compelling state interests. First, it claims that the state has a compelling interest in preventing actual or perceived corruption in candidate elections. The commission next asserts that the state has a compelling interest in enforcing other constitutional campaign finance laws. The commission's third claimed compelling interest is based on the importance of informing voters about candidates in an election for public office. Finally, the commission maintains that preventing fraud and libel is a valid compelling state interest. We address each asserted interest seriatim.

I

The commission first claims that it has a compelling interest in preventing actual or perceived corruption in candidate elections. We agree.

In the landmark election law case of *Buckley* v. *Valeo*, supra, 424 U.S. 67, the United States Supreme Court explicitly concluded that eliminating corruption in candidate elections is a substantial state interest. See also *Nixon* v. *Shrink Missouri Government PAC*, 528 U.S. ___, 120 S.Ct. 897, 903-905, 145 L.Ed.2d 886 (2000); *Federal Election Commission*

v. *National Conservative Political Action Committee*, 470 U.S. 480, 497, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985). The court explained that "[a] public armed with information about a candidates's most generous supporters is better able to detect any post-election special favors that may be given in return. . . . Congress could reasonably conclude that full disclosure during an election campaign tends to prevent the corrupt use of money to affect elections." (Citation omitted; internal quotation marks omitted.) *Buckley* v. *Valeo*, supra, 67.

The plaintiffs contend, however, that the United States Supreme Court's decision in *McIntyre* v. *Ohio Elections Commission*, supra, 514 U.S. 334, rejected the *Buckley* reasoning. In *McIntyre*, the petitioner had distributed unsigned, and hence anonymous leaflets to individuals attending a public meeting at a town middle school. The leaflets expressed her opposition to a proposed tax levy that was to be discussed that evening. Id., 337. A school official eventually filed a complaint, charging that her distribution of unsigned leaflets violated Ohio state election laws, which prohibited anonymous pamphleteering. Id., 338. The state elections enforcement commission agreed and imposed a $100 fine. Id. The Supreme Court struck down the statute as an unconstitutional abridgement of the petitioner's right to freedom of speech. Id., 357.

The statute at issue in *McIntyre* applied to referenda and other issue-based ballot measures, *as well as* to candidate elections.[6] In striking down the statute, the court in *McIntyre*

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[6] "Ohio Rev. Code Ann. § 3599.09(A) (1988) provides [in relevant part]: 'No person shall write, print, post or distribute, or cause to be written, printed, posted, or distributed, a notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election, or make an expenditure for the purpose of financing political communications through newspapers, magazines, outdoor advertising facilities, direct mailings, or other similar types of general public political advertising, or through flyers, handbills, or other nonperiodical printed matter, unless there appears on such form of publication in a conspicuous place or is contained within said statement the name and residence or business address of the chairman, treasurer, or secretary of the organiza-

specifically stated that, "[i]n candidate elections, the Government can identify a compelling state interest in avoiding the corruption that might result from campaign expenditures. Disclosure of expenditures lessens the risk that individuals will spend money to support a candidate as a quid pro quo for special treatment after the candidate is in office. Curriers of favor will be deterred by the knowledge that all expenditures will be scrutinized by the Federal Election Commission and by the public for just this sort of abuse." Id., 356. The Supreme Court specifically noted, however, that referenda and other issue-based ballot measures would not breed the same opportunities for corruption. Id., 352 n. 15. In those situations, there are no elected officials beholden to those who supported the candidate during the campaign. "The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue." (Citations omitted.) *First National Bank of Boston* v. *Bellotti*, supra, 435 U.S. 790.

Mindful of this precept, we note that, by its terms, §9-333w (a) is limited to elections and party-related solicitations. There is no indication that the disclosure statute applies to referenda or other issue-based ballot measures. Furthermore, in the present case, it was applied only to a candidate election. Thus, the first amendment concerns that the United States Supreme Court expressed in *McIntyre* are inapplicable here. Accordingly, the prevention of actual and perceived corruption in candidate elections is a compelling and valid state interest.

2

Second, the commission contends that the attribution requirement directly advances the state's ability to investigate and enforce other campaign finance laws that are, in fact, constitutional. This interest was also upheld by the Supreme

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tion issuing the same, or the person who issues, makes, or is responsible therefor. . . .'" *McIntyre* v. *Ohio Elections Commission*, supra, 514 U.S. 338 n. 3.

Court in *Buckley*. There, the court stated that "record-keeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations. . . ." *Buckley* v. *Valeo*, supra, 424 U.S. 67-68. Moreover, although the enforcement interest was not directly called into question in *McIntyre*, the court nevertheless acknowledged that enforcing other laws may be a valid interest under some circumstances. "We recognize that a State's enforcement interest might justify a more limited identification requirement, but Ohio has shown scant cause for inhibiting the leafletting at issue here." *McIntyre* v. *Ohio Elections Commission*, supra, 514 U.S. 353.

We are persuaded that Connecticut's disclosure requirements assist the commission in its investigative function. The state points out that political action committees are prohibited from donating more than $5000 to candidates for the office of governor in an upcoming election. See General Statutes § 9-333o(d)(1).[7] During campaigns, however, candidates often send mass mailings at a substantial cost. The attribution requirement allows the commission to monitor strictly who is paying these costs, thereby ensuring that political action committees are not exceeding their statutory contribution limits.

Furthermore, the attribution requirement assists in monitoring self-funded campaigns. Self-funded campaigns are not subject to the same guidelines as campaigns funded by donations. The attribution requirement provides the commission with another way to ensure that campaign literature is funded, not from third parties, but from the candidates themselves. Both of these examples demonstrate how the attribution requirement allows the commission to enforce election laws while limiting the time, effort and financial resources necessarily consumed during the investigation. For these reasons,

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[7] General Statutes § 9-333o (d) provides in relevant part: "A political committee organized by a business entity shall not make a contribution or contributions to or for the benefit of any candidate's campaign for nomination at a primary or any candidate's campaign for election to the office of: (1) Governor, in excess of five thousand dollars. . . ."

we conclude that investigating and enforcing other constitutional campaign finance laws is a valid compelling state interest.

3

The commission next claims that the state has a compelling interest in informing voters about candidates in an election for public office. This has been an evolving issue.

In *McIntyre*, the court clearly rejected the informational interest when it announced: "Insofar as the interest in informing the electorate means nothing more than the provision of additional information that may either buttress or undermine the argument in a document, we think the identity of the speaker is no different from other components of the document's content that the author is free to include or exclude. . . . The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit." (Citation omitted.) *McIntyre* v. *Ohio Elections Commission*, supra, 514 U.S. 348. The court reasoned that "[p]eople are intelligent enough to evaluate the source of an anonymous writing." Id., 348 n. 11. The manner in which the court in *McIntyre* disposed of the informational interest, however, is contrary to the court's previous handling of this issue.

In *Buckley*, the Supreme Court expressly held the informational interest to be compelling, and therefore recognized it as sufficient to validate disclosure requirements with regard to candidate elections. The court announced that "disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future perfor-

mance in office." (Internal quotation marks omitted.) *Buckley* v. *Valeo*, supra, 424 U.S. 66-67.

The court reaffirmed the validity of this interest two years later in *Bellotti*. The court explained that citizens of our democratic society are responsible for evaluating conflicting messages, but that, in making such evaluations, they may consider the source and credibility of the advocate. *First National Bank of Boston* v. *Bellotti*, supra, 435 U.S. 791-92. The court stated: "Corporate advertising, unlike some methods of participation in political campaigns, is likely to be highly visible. Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." Id., 792 n. 32.

In *McIntyre*, the court distinguished these cases by explaining that, when independent expenditures are involved, the state's interest in informing its electorate are not served significantly by requiring disclosure. "[I]n the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader's ability to evaluate the document's message." *McIntyre* v. *Ohio Elections Commission*, supra, 514 U.S. 348-49. In specific response to the informational interest substantiated by *Buckley* and *Bellotti*, the court in *McIntyre* explained that "[t]hose comments concerned contributions to the candidate or expenditures authorized by the candidate or his responsible agent. They had no reference to the kind of independent activity pursued by [the petitioner]." Id., 354. Thus, in distinguishing itself from *Buckley* and *Bellotti*, the court in *McIntyre* nonetheless preserved the legitimacy of the informational interest in cases not involving independent expenditures.

There is a fundamental difference between the situation in *McIntyre* and a disclosure statute, like § 9-333w, that is limited to candidate elections. Section 9-333w (a) does not present the possibility that a private individual would be compelled to disclose her identity when that information would "add little, if anything, to the reader's ability to evaluate the

document's message." Id., 349. We trust that Connecticut's disclosure requirement fairly enables voters to evaluate better the message and its source. In addition, we note that § 9-333w (a) applies to solicitations. Addressing a similar statute, the United States Court of Appeals for the Second Circuit upheld the informational interest as compelling as applied to solicitations. The court stated: "*McIntyre*'s holding that simply informing the electorate is not a sufficiently compelling interest to justify a ban on anonymous campaign literature . . . was based on the premise that the interest in informing the electorate means nothing more than the provision of additional information that may either buttress or undermine the argument in a document. . . . In this case, however, the government's interest in identifying who paid for a solicitation letter . . . goes significantly further: by avoiding any misunderstanding as to the actual recipient of the solicited contribution, [the statute] enables the solicitee to contribute money to those groups which truly reflect his or her beliefs. This is the sort of critical information that protects the integrity of the electoral process." (Citations omitted; internal quotation marks omitted.) *Federal Election Commission* v. *Survival Education Fund, Inc.*, 65 F.3d 285, 297 (2d Cir. 1995). The Second Circuit's reasons for upholding this interest are equally applicable to the present case. We conclude that the informational interest sought to be vindicated by Connecticut's disclosure statute is compelling.

4

Finally, the commission claims that the state has a compelling interest in preventing fraud and libel, and further, that the statute serves to protect candidates. Although this interest was insufficient under the facts of *McIntyre*, the Supreme Court left open the possibility that preventing fraud and libel may be a valid compelling interest during the course of an election. *McIntyre* v. *Ohio Elections Commission*, supra, 514 U.S. 349. The court admitted that Ohio's interest in preventing fraud and libel "carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large." Id.

The court determined, however, that Ohio has other election laws that specifically prohibit the dissemination of false statements during political campaigns. Id. "Thus, Ohio's prohibition of anonymous leaflets plainly is not its principal weapon against fraud. Rather, it serves as an aid to enforcement of the specific prohibitions and as a deterrent to the making of false statements by unscrupulous prevaricators." Id., 350-51. Although the benefits provided by statute were "legitimate," they could not justify the regulation's "extremely broad prohibition." Id., 351.[8] On the contrary, Connecticut's statutes do not contain a provision that specifically prohibits fraud and libel during a campaign. Thus, Connecticut relies more heavily on its disclosure statute to combat the occurrence of these evils during a candidate election.

The amicus curiae claims that the availability of common-law tort actions in Connecticut is sufficient protection against fraud and libel. Although it is true that *McIntyre* specifically mentioned common-law actions as a means to assail the harms brought on by fraud and libel, reliance on that case to support the amicus' assertion is misplaced. Although the court in *McIntyre* noted that Ohio was able to rely on its common-law tort of libel for protection, it made this reference as an alternative to the statute at issue in that case.[9] Id., 350 n. 13. Ohio's direct ban on election fraud coupled with common-law actions were deemed to be sufficient protection against such evils. In the wake of these combined efforts, the anonymity ban was nothing more than a supplement to serve this

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[8] The Supreme Court stated: "Although these ancillary benefits are assuredly legitimate, we are not persuaded that they justify § 3599.09(A)'s extremely broad prohibition." *McIntyre* v. *Ohio Elections Commission*, supra, 514 U.S. 351.

[9] The court explained, "[t]o the extent those [election code] provisions may be underinclusive, Ohio courts also enforce the common-law tort of defamation." *McIntyre* v. *Ohio Elections Commission*, supra, 514 U.S. 350-51 n. 13.

interest.[10] Id. Nothing in *McIntyre* suggests that the availability of common-law tort actions *alone* would constitute a sufficient alternative means of preventing fraud and libel.

Moreover, the mere existence of a common-law remedy does not, in itself, defeat the compelling interest served by § 9-333w (a). In enacting the disclosure statute, the legislature had a specific purpose in mind. According to Jeffrey Garfield, the then executive director and general counsel of the commission, which was the proponent of the bill, the statute was intended to have "the effect of promoting truth in political advertising, and in improving the enforcement capacity of the commission." Conn. Joint Standing Committee Hearings, Government Administrations and Elections, Pt. 1, 1980 Sess., p. 72. We presume that the legislature, by enacting § 9-333w, deemed common-law tort remedies to be insufficient to satisfy these needs. See *State* v. *Nixon*, 231 Conn. 545, 559, 651 A.2d 1264 (1995) ("[w]hen the legislature acts, however, it is presumed to know the state of the law"); *Zachs* v. *Groppo*, 207 Conn. 683, 696, 542 A.2d 1145 (1988) ("the legislature is presumed to have acted with knowledge of existing statutes and with an intent to create one consistent body of laws"). This is not to say that the legislature's need to create the statute thereby renders it constitutional. We conclude only that a void recognized by the legislature was not being served by the then existing common law. In other words, common-law tort remedies alone were deemed to be insufficient to serve the interests protected by § 9-333w (a).

Connecticut's disclosure statute is not duplicative of a common-law tort remedy. Without it, a gap would be created in the law where § 9-333w (a) once governed. Accordingly, we conclude that the state's interest in preventing fraud and libel is justifiably served by the disclosure statute.

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[10] The Supreme Court noted: "Like other forms of election fraud, then, Ohio directly attacks the problem of election-related libel; to the extent that the anonymity ban serves the same interest, it is merely a supplement." *McIntyre* v. *Ohio Elections Commission*, supra, 514 U.S. 350-51 n. 13.

In this regard, the commission recently was involved in a case that highlights the importance of preventing fraud and libel, and how disclosure statutes work to protect candidates. See State Elections Enforcement Commission, Stipulated Agreement Containing Consent Order, File Nos. 98-167, 98-169. During a certain campaign in 1998, written materials, which did not contain the attribution information, were circulated containing the challenger's name and telephone number, and were made to appear as though they were distributed by the challenger himself. Id. The materials also created the impression that the challenger was working closely with an individual, who was publicly known to have a criminal record. Id. After an investigation, the commission learned that the materials were created by someone close to the incumbent's campaign. Id.

Thus, the attribution requirement works to prevent fraud and libel and, specifically, protects candidates from unscrupulous attacks by requiring that those who seek to mislead the electorate into thinking that the *candidate* has issued certain materials, disclose their identity. That disclosure requirement will serve as a disincentive to such misleading conduct. Those working with candidates or campaigns risk violating § 9-333w (a) for failure to disclose the payor of the distribution. Consequently, the attribution requirement works to deter unethical tactics, because violators will be held publicly accountable.

In sum, we conclude that the state has valid compelling interests in preventing corruption, advancing the state's ability to investigate campaign finance laws, providing the electorate with information, and deterring fraud and libel. These interests, together and separately, justify the disclosure requirement set forth in § 9-333w (a).

B

In accordance with the exacting scrutiny standard set forth by *McIntyre* v. *Ohio Elections Commission*, supra, 514 U.S. 347, we now must determine whether § 9-333w (a) is narrowly tailored to serve those state interests that we have found

to be compelling. The court in *McIntyre* provided a list of factors that it considered in its determination that the Ohio statute in question was unconstitutional. The court explained: "As this case demonstrates, the prohibition encompasses documents that are not even arguably false or misleading. It applies not only to the activities of candidates and their organized supporters, but also to individuals acting independently and using only their own modest resources. It applies not only to elections of public officers, but also to ballot issues that present neither a substantial risk of libel nor any potential appearance of corrupt advantage. It applies not only to leaflets distributed on the eve of an election, when the opportunity for reply is limited, but also to those distributed months in advance. It applies no matter what the character or strength of the author's interest in anonymity." Id., 351-52. With these criteria in mind, we conclude that § 9-333w (a) is narrowly tailored to serve the state's interests.

A comparative analysis of the Ohio and Connecticut statutes exposes critical distinctions, the most significant of which reveals that they apply to distinct categories of persons. The Ohio statute prohibits *anyone* from distributing certain materials unless identified. The Connecticut statute applies only to individuals associated in some way with a campaign.[11] Thus, the Connecticut statute requires disclosure of the identity of a party paying for a distribution if that party is working at the

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[11] Ohio's statute prohibited anyone from writing or distributing any "publication which is designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election" unless the name of the party responsible for or issuing the statement appears on the distribution. Ohio Rev. Code Ann. § 3599.09(A) (1988). The Connecticut statute, however, provides that "[n]o individual shall make or incur any expenditure with the cooperation of, at the request or suggestion of, or in consultation with any candidate, candidate committee or candidate's agent, and no candidate or committee shall make or incur any expenditure for any . . . communication which promotes the success or defeat of any candidate's campaign for nomination at a primary or election or solicits funds to benefit any political party or committee unless" the payor is identified. General Statutes § 9-333w (a).

direction of an election committee. It would not, however, require such disclosure by an individual who is not associated with a campaign in any way. In other words, § 9-333w (a) does not prevent or hinder an individual, acting independently, from expressing her opinion in any manner. The critical distinction between candidates or their organized supporters and independent individuals was noted by the Supreme Court in *Buckley*[12] and confirmed in *McIntyre*. See id., 351 n. 14.

Furthermore, it is notable that the Ohio statute applied to referenda, as well as to candidate elections. Referenda entail the practice of submitting legislative proposals to popular vote. Referenda, however, do not encompass the same dangers as candidate elections. Id., 352-53 and 352 n. 15. Although the opportunities to fashion disparaging remarks about one's opponent are prevalent during candidate elections, expressions of opinion on referenda issues are unlikely to provide a similar platform of negative commentary. Personal opinions concerning the benefits or disadvantages of a proposal do not result in comparable personal attacks. Consequently, the potentially libelous and fraudulent statements that may hinder a candidate's chances of attaining elective office are not of equal concern in the arena of referenda. Indeed, the Second Circuit Court of Appeals has discussed the difference between candidate elections and referenda voting as it relates to corporate contributions. "Corporate funds paid to a candidate or political party have the potential of creating debts that must be paid in the form of special interest legislation or administrative action. In contrast, when the issue is one to be resolved by the public electorate monies paid by a corporation for public expression of its views create no debt or obligation on the part of the voters to favor the corporate contributor's special interest. Although large private companies have un-

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[12] The Supreme Court stated: "Treating these expenses as contributions when made to the candidate's campaign or at the direction of the candidate or his staff forecloses an avenue of abuse without limiting actions voluntarily undertaken by citizens independently of a candidate's campaign." *Buckley* v. *Valeo*, supra, 424 U.S. 37. The court went on to strike down limitations on independent expenditures.

doubtedly been tempted to 'buy' the election of political candidates in the expectation of receiving favors if their candidates should be elected, it is difficult to see how such motivation would play any substantial role in an attempt to influence votes for or against a referendum." *Schwartz* v. *Romnes*, 495 F.2d 844, 851 (2d Cir. 1974).

Unlike Ohio's disclosure statute, § 9-333w (a) concerns only communication discussing candidates for election or the solicitation of funds for political parties. Therefore, § 9-333w (a) does not run afoul of the same obstacles on which the Ohio statute foundered. In this way, Connecticut's disclosure statute is far more narrowly tailored than Ohio's disclosure statute.

In holding that § 9-333w (a) is constitutional, we do not thereby undermine the important role that anonymity has played in American political culture. We acknowledge that anonymous distribution of one's ideas is not only protected by the first amendment, but lies at the core of its existence. It is well established that "[t]he decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. . . . Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." *McIntyre* v. *Ohio Elections Commission*, supra, 514 U.S. 341-42. Similarly, in *Talley* v. *California*, 362 U.S. 60, 64, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960), the court held that the first amendment protects the distribution of anonymous handbills urging a boycott of certain local merchants. Although the importance of the right to remain anonymous is indisputable, that does not mean that anonymity is an absolute right. See *Citizens Against Rent Control* v. *Berkeley*, 454 U.S. 290, 299-300, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981) (noting that legislature may, under valid circumstances, ban anonymous contributions); *Buckley* v. *Valeo*, supra, 424 U.S. 1 (upholding disclosure statutes).

Accordingly, we conclude that the present issue is readily distinguishable from those presented by *McIntyre* and *Talley*. Section 9-333w (a) applies to candidates and those associated with candidates, not persons unrelated to that candidacy. The idea that a candidate has an absolute right to anonymous speech when discussing the very issues that lie at the center of her campaign is paradoxical. "There are inherent limitations of a unique and significant nature regarding any claim to the right of privacy on the part of candidates and incumbent public officials." *Fritz* v. *Gorton*, 517 P.2d 911, 923 (Wash. 1974). Candidates, by their very nature, hope to gain support by aligning themselves with particular issues. This process necessarily calls for one to identify a named candidate, with that candidate's public views. Thus, when candidate speech is involved, fears of "retaliation" or "social ostracism" are severely limited. A per se right to anonymity in this situation simply would be untenable.

Moreover, our state disclosure statute does not impede one's ability to contribute to a campaign, even if that individual is associated with the campaign's efforts. It is true that one working in cooperation with a campaign, wishing to make a contribution in the form of some written distribution, would be required to disclose his identity. Other alternatives are available, however, for one who wishes to refrain from having his name printed on the distribution. This contributor is still free to make a financial donation directly to the campaign itself, thereby avoiding having his name listed on handbills.[13]

In addition, the plaintiffs' contention that the statute's address requirement is not sufficiently narrow and impedes one's right to anonymity is groundless. The plaintiffs contend that, if numerous public officials refrain from publishing their home address and telephone number to avoid crank letters and vandals, then those subject to § 9-333w (a) are entitled to the same anonymity. The plaintiffs' argument, however, misses the point. The address requirement adds a level of identification

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[13] Individual contributions, however, may also be subject to varying disclosure requirements. See, e.g., General Statutes § 9-333n (d) and (e).

in order to increase accountability. Although public officials are not required to disclose their personal information, their office contact information is public knowledge. One of the foundations of our democratic society is that citizens have the opportunity to contact their public officials and representatives directly through telephone calls and letters to the appropriate office. The disclosure statute allows for the same opportunity. Section 9-333w (a) requires only that an address be listed. It does not require a personal or home address. By mandating that an address be listed on distributions falling within its ambit, § 9-333w (a) increases accountability, provides for contact information, and augments the likelihood of gaining a proper identification of the payor. We therefore conclude that the address requirement contained in § 9-333w (a) does not render the statute overbroad, and further, that our statute does not impede an individual, acting independently of a campaign, from anonymous expression.[14]

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[14] It is noteworthy that § 9-333w (a) was amended in 1995, in direct response to the Supreme Court's decision in *McIntyre*. See Public Acts 1995, No. 95-276. During discussions of the proposed amendment, then State Representative Susan Bysiewicz explained: "This amendment is due to a recent United States Supreme Court decision, which now requires Connecticut to revise its election laws with respect to attribution on political campaign advertising and materials. This recent decision indicates that attribution cannot be required when an individual acts independently to finance political advertising. What we're doing here in this amendment is proposing to revise Connecticut law to create an exception so that individual independent expenditures on leaflets and advertising would not require such attribution." 38 H.R. Proc., Pt. 15, 1995 Sess., p. 5473. Thus, we see that the legislature amended its original attribution statute to comply with *McIntyre*. We must presume that the legislature understood the legal implications of *McIntyre* and, therefore, modified § 9-333w (a) to be in compliance with that case. See, e.g., *State* v. *Nixon*, supra, 231 Conn. 559 ("[w]hen the legislature acts . . . it is presumed to know the state of the law"); *Lynn* v. *Haybuster Mfg., Inc.*, 226 Conn. 282, 291, 627 A.2d 1288 (1993) (same); *State* v. *Dabkowski*, 199 Conn. 193, 201, 506 A.2d 118 (1986) (same). "Without question, the General Assembly is presumed to have knowledge of decisions of the United States Supreme Court on constitutional issues that bind actions of the states when

Accordingly, we conclude that § 9-333w (a) is narrowly tailored to serve compelling state interests, and therefore is valid and enforceable.[15] We recognize, however, the fine line between *McIntyre* and the present case. Throughout part I of this opinion, we have weighed an individual's first amendment interest in the freedom of speech against the state's interest in protecting the integrity of the electoral process. In doing so, we conclude that the intrusion upon any specific individual rights is minor when compared to the benefits gained by, and the importance of, a fair electoral process. On balance, this conclusion best serves and protects the people of Connecticut. A contrary result would undermine the integrity of the electoral process. We conclude that § 9-333w (a), as narrowly drafted, passes constitutional muster. A decision calling for a more narrowly drafted disclosure statute is best left to the legislature.

II

The plaintiffs further claim that the commission's delay of a hearing until after the election and its publicized opinion as to the conduct of the plaintiffs violated their rights to free

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enacting statutes that potentially invoke such issues." *Virginia Society for Human Life, Inc.* v. *Caldwell*, 152 F.3d 268, 273 (4th Cir. 1998).

[15] The plaintiffs and the amicus contend that, even if § 9-333w (a) is generally constitutional, it is unconstitutional as applied to the plaintiffs because the expenditures involved were de minimis. The amicus cites *Buckley* to support its position. We disagree with its reading of that case. *Buckley* did not suggest that disclosure requirements below a certain threshold would be violative of the first amendment. On the contrary, *Buckley* specifically stated that it would not address that question. "[W]e do not reach the question whether information concerning gifts of this size can be made available to the public without trespassing impermissibly on First Amendment rights." *Buckley* v. *Valeo*, supra, 424 U.S. 84. The court did insist, however, that threshold disclosure amounts are a legislative decision. "The line is necessarily a judgmental decision, best left in the context of this complex legislation to congressional discretion." Id., 83. Accordingly, we will not substitute our judgment for the legislature's in deciding that some arbitrary threshold would be more reasonable than the current, "zero tolerance" line established by § 9-333w (a).

speech and due process under the first, fifth and fourteenth amendments to the United States constitution. We disagree.

General Statutes § 9-7a (g) addresses the commission's responsibilities with regard to written complaints. It provides in relevant part: "In the case of a written complaint . . . if the commission does not, by the sixtieth day following receipt of the complaint, either issue a decision or render its determination that probable cause or no probable cause exists for one or more violations of state election laws, the complainant or respondent may apply to the superior court for the judicial district of Hartford for an order to show cause why the commission has not acted upon the complaint and to provide evidence that the commission has unreasonably delayed action. . . ." General Statutes § 9-7a (g). The plaintiffs contend that the commission was obligated to issue a decision prior to the November 4 election. The two complaints, however, were filed on September 18 and October 8; less than sixty days prior to the election.[16] The commission, therefore, was under no obligation to issue a decision during the time leading up to the election. If after sixty days the commission made no decision as to the complaints, the plaintiffs had recourse through the statutory remedy of an application for an order to show cause. The plaintiffs, however, failed to seek such a remedy. Moreover, § 9-7a (g) concludes: "Nothing in this subsection shall preclude the commission from continuing its investigation or taking any action permitted by section 9-7b, unless otherwise ordered by the court. . . ." General Statutes § 9-7a (g). Thus, the statute specifically provides for the commission's continued investigation until otherwise ordered, regardless of the time frame.

The plaintiffs' additional claim that the commission's "threats and expressions of opinion as to the guilt of [the] plaintiffs" violated their constitutional rights is equally un-

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[16] The commission treated the second McGuire complaint (October 2, 1997) as an amendment to the first complaint (September 16, 1997). Thus, the sixty day period did not actually commence until the filing of the second complaint.

persuasive. Specifically, the plaintiffs contend that two articles appearing in local newspapers on December 17 and 18, 1997, unfairly labeled them as guilty of the pending allegations. In those articles, a commission staff attorney stated that this was a "clear case" where the plaintiffs "broke the law."[17]

It should first be noted that these two articles could not have affected the November 4, 1997 election, because they were published more than one month *after* the election occurred. Also, the articles primarily discuss the DeMazza complaint, which was dismissed and is not the subject of this appeal. See footnote 2 of this opinion. In fact, the McGuire complaints were mentioned in only one sentence of each article. Finally, and most importantly, there is no evidence in this record to support the plaintiffs' claim that any prehearing publicity affected the adjudication of their hearing. We conclude, therefore, that the plaintiffs' constitutional rights were not violated either by the time frame in which the commission adjudicated the complaints or by the prehearing publicity.

III

The plaintiffs' final assertion is that the composition of the commission violates the separation of powers doctrine. We disagree.

It is well established that "[t]he party attacking a validly enacted statute . . . bears the heavy burden of proving its unconstitutionality beyond a reasonable doubt and we indulge in every presumption in favor of the statute's constitutionality." *State* v. *Breton*, 212 Conn. 258, 269, 562 A.2d 1060 (1989); see also *Morascini* v. *Commissioner of Public Safety*, 236 Conn. 781, 789, 675 A.2d 1340 (1996); *Adams* v. *Rubinow*, 157 Conn. 150, 152-53, 251 A.2d 49 (1968).

In support of their claim that the makeup of the commission violates the separation of powers doctrine, the plaintiffs

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[17] See T. Fitzmaurice, "Seymour, 11 Others Face Election Law Hearing in Hartford," Lakeville Journal, Dec. 18, 1997, p. A1; J. Longley, "Hearing to air campaign complaint," Waterbury Republican-American, Dec. 17, 1997, p. 1A.

again rely on *Buckley*. In *Buckley*, the court held that the Federal Elections Commission could not exercise its enforcement function because four of its six voting members were appointed by Congress in violation of the separation of powers doctrine. *Buckley* v. *Valeo*, supra, 424 U.S. 127. The court reasoned that the Federal Elections Commission was comprised of "Officers of the United States" within the meaning of the appointments clause,[18] and it was therefore unconstitutional for the legislature, rather than the president, to appoint individuals to the commission. Id., 125-26.

Similar to the Federal Elections Commission, our state commission consists of five members, four of whom are appointed by the legislature, and the other is appointed by the governor.[19] Unlike the federal constitution, however, the Connecticut counterpart has no appointments clause. With no parallel clause in the Connecticut constitution, the appointment of high ranking officers of the state of Connecticut is not limited to the governor. In response to a letter questioning the effect of *Buckley* on the commission, the attorney general stated that "[i]t is readily apparent that the Connecticut Constitution contains no Appointments Clause similar to the one found in the United States Constitution. As a matter of fact, the Legislature has on many occasions combined with the Governor on making appointments to executive agencies. . . ."[20] Opinions, Conn. Atty. Gen. (February 11, 1976). The

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[18] The appointments clause provides in relevant part: "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const., art. II, § 2, cl. 2.

[19] See footnote 5 of this opinion for the relevant text of § 9-7a (a).

[20] After remarking that the lack of an appointments clause allowed the governor and legislature to make joint appointments to executive agencies, the attorney general continued: "This was the situation before our Con-

lack of an appointments clause in Connecticut's constitution is fatal to the plaintiffs' argument.

In addition to the framers' decision not to adopt an appointments clause, we have long recognized that under appropriate circumstances powers may be shared by the three branches of government in this state. This court has stated that "[t]he separation of powers doctrine serves a dual function: it limits the exercise of power within each branch, yet ensures the independent exercise of that power. Nevertheless, it cannot be rigidly applied always to render mutually exclusive the roles of each branch of government. As we have recognized, the great functions of government are not divided in any such way that all acts of the nature of the function of one department can never be exercised by another department; such a division is impracticable, and if carried out would result in the paralysis of government. Executive, legislative and judicial powers, of necessity overlap each other, and cover many acts which are in their nature common to more than one department." (Internal quotation marks omitted.) *Massameno* v. *Statewide Grievance Committee*, 234 Conn. 539, 552, 663

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stitution of 1965 was adopted and still is the situation. Some examples of current commissions with dual appointments are the Connecticut Commission on Special Revenue, State Capitol Preservation and Restoration Commission, Commission on Hospitals and Health Care, Connecticut Solid Waste Management Advisory Council, and the Advisory Council on Aging. It appears that in this area of relationships we have operated more flexibly under the separation of powers than in the area of relationships between the Legislature and the Judiciary. This is a mere recognition of the principles that [t]he rule of separation of governmental powers cannot always be rigidly applied. . . .

"As we have noted, the appointive power in Connecticut traditionally has never been the exclusive prerogative of the executive, but instead has been shared with the legislative branch from time to time. . . . It should require little discussion to demonstrate that this system is among a number of alternatives that ensure a balance of power in government. Therefore, it is our opinion that the Supreme Court decision in *Buckley* v. *Valeo*, supra, [424 U.S. 1] does not have any adverse effect on the constitutional composition of your Commission." (Citations omitted; internal quotation marks omitted.) Opinions, Conn. Atty. Gen. (February 11, 1976).

A.2d 317 (1995). We have consistently "held that there are activities in which more than one branch of government may participate." *University of Connecticut Chapter, AAUP* v. *Governor*, 200 Conn. 386, 394, 512 A.2d 152 (1986).

We have established that "in deciding whether one branch's actions violate the constitutional mandate of the separation of powers doctrine, the court will consider if the actions constitute: (1) an assumption of power that lies exclusively under the control of another branch; or (2) a significant interference with the orderly conduct of the essential functions of another branch." *Massameno* v. *Statewide Grievance Committee*, supra, 234 Conn. 552-53; see also *Bartholomew* v. *Schweizer*, 217 Conn. 671, 676, 587 A.2d 1014 (1991); *State* v. *Darden*, 171 Conn. 677, 679, 372 A.2d 99 (1976).

In the present case, the plaintiffs are unable to demonstrate that the appointive power in Connecticut is exclusively under the control of the executive branch. Nor can they show that legislative appointment to the commission significantly interferes with the essential functions of the executive branch. The case law, in fact, suggests the opposite. For example, in *State* v. *Moynahan*, 164 Conn. 560, 567-71, 325 A.2d 199, cert. denied, 414 U.S. 976, 94 S.Ct. 291, 38 L.Ed.2d 219 (1973), this court upheld a statute that provided for the appointment of state's attorneys by the judicial branch. Although state's attorneys are generally considered to exercise executive power, the court reasoned that they actually exercise both executive and judicial powers. Id., 568.

Similarly, powers exercised by members of the commission are not strictly executive. Commission duties and powers include, inter alia, levying civil penalties,[21] adopting regu-

[21] General Statutes § 9-7b (a) (2) provides in relevant part that the commission has the power "[t]o levy a civil penalty. . . ."

lations[22] and investigating alleged violations.[23] Thus, commission members participate in activities traditionally thought of as judicial, legislative and, of course, executive. The plaintiffs have failed to demonstrate that the actions exercised by the commission are exclusively dedicated to any one branch of government. Moreover, the plaintiffs have not met their heavy burden to establish that the actions taken by the commission significantly interfere with any branch's ability to perform its duties. We therefore conclude that the composition of Connecticut's commission does not violate the separation of powers doctrine.

In sum, we conclude that § 9-333w (a) is constitutional, that the commission's handling of the complaints did not violate the plaintiffs' constitutional rights, and that the composition of the commission is not in violation of the separation of powers doctrine. The judgment is affirmed.

In this opinion BORDEN and PALMER, Js., concurred.

MCDONALD, C.J., dissenting.

With whom SULLIVAN, J., joins.

This case involves a one page press release and a two page press release issued by the plaintiffs, Gabriel Seymour and Robert Reid, in which these candidates for the board of selectmen outlined their election platform and their proposals for political reform in the town of Canaan. The two releases were prepared by Seymour on her computer, and she faxed

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[22] General Statutes § 9-7b (a) (13) provides in relevant part that the commission has the power "[t]o adopt and publish regulations . . . and to make recommendations to the General Assembly concerning suggested revisions of the election laws. . . ."

[23] General Statutes § 9-7b (a) provides in relevant part: "The State Elections Enforcement Commission shall have the following duties and powers:

> "(1) To make investigations on its own initiative or with respect to statements filed with the commission . . . with respect to alleged violations of any provision of the general statutes relating to any election or referendum. . . ."

them to three newspapers. The names and telephone numbers of both plaintiffs were printed at the top of these releases. The expenditures incurred by the plaintiffs for the preparation and distribution of the news releases have not been calculated, but the record reflects that they were the cost of three pieces of paper and the ink used in printing the releases, and the cost (if any) of six local telephone calls — mere pennies.

The elections enforcement commission (commission) held that, because the press releases did not contain the words "paid for by" preceding the names and telephone numbers of the plaintiffs, the plaintiffs were "in technical violation" of General Statutes § 9-333w (a).[24] The majority now affirms this ruling.

"Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . . . Although First Amendment protections are not confined to the exposition of ideas . . . there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs . . . of course includ[ing] discussions of candidates. . . . This no more than reflects our profound national

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[24] General Statutes § 9-333w (a) provides: "No individual shall make or incur any expenditure with the cooperation of, at the request or suggestion of, or in consultation with any candidate, candidate committee or candidate's agent, and no candidate or committee shall make or incur any expenditure for any written, typed or other printed communication which promotes the success or defeat of any candidate's campaign for nomination at a primary or election or solicits funds to benefit any political party or committee unless such communication bears upon its face the words 'paid for by' and the following: (1) In the case of such an individual, the name and address of such individual; (2) in the case of a committee other than a party committee, the name of the committee and its campaign treasurer; or (3) in the case of a party committee, the name of the committee."

commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . . In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court [previously observed] . . . it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office. *Buckley* v. *Valeo*, 424 U.S. 1, 14-15 [96 S.Ct. 612, 46 L.Ed.2d 659] (1976) (per curiam)." (Citations omitted; internal quotation marks omitted.) *McIntyre* v. *Ohio Elections Commission*, 514 U.S. 334, 346-47, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995). "When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." Id., 347. As noted by Justice Scalia in his dissent in *McIntyre*, this standard is ordinarily the "kiss of death." Id., 380.

The majority finds that four compelling state interests justify infringement upon this core political speech. First is the state's interest in preventing actual or perceived corruption. See *Nixon* v. *Shrink Missouri Government PAC*, 528 U.S. ___, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000). The evil is presented as postelection favors for the candidate's supporters. That reason simply does not exist in this case. Here, the candidate is spending her own money and less than $1.

Second, quoting *Buckley* v. *Valeo*, supra, 424 U.S. 67-68, the majority finds that the funding source requirement is "'an essential means of gathering the data necessary to detect violations of the contribution limitations. . . . '" As required by *Buckley* v. *Valeo*, supra, 52-54, however, and as provided in General Statutes § 9-333l (c),[25] there are no limits on the

[25] General Statutes § 9-333l (c) provides: "A candidate may make any expenditure permitted by section 9-333i to aid or promote the success of his campaign for nomination or election from his personal funds, or the funds of his immediate family, which for the purposes of this chapter

self-funding of campaigns. In this case there are no contribution limitations. As *Buckley* again points out, if discovering violations of campaign contributions by the candidate is the function of the funding disclosure, disclosure would not serve any governmental purpose in this case. Id., 76.[26]

The majority also finds that the provision ensures that the public will know who is the source of the press releases. In this case, the addition of the fact that the candidate herself funded the releases with pennies adds nothing to the public's ability to evaluate the message of those documents by knowing their source. See *McIntyre* v. *Ohio Elections Commission*, supra, 514 U.S. 334.

Last, the majority finds that the "paid for" label may prevent libel and fraud. The candidate's name and address on the press release, however, fully serves this purpose. I fail to see how stating that the candidate herself prepared the release on her computer with her three pieces of paper and faxed them to the newspapers at her own small expense advances this claimed state interest. Simply put, none of the goals claimed by the commission are advanced by the application of the statute in this case.

In the words of the commission itself, this was a "technical violation" that, in ordinary English, translates into action that did not violate the substance of the election law.

The commission endangers vigorous political debate by straining at a gnat. Were it not for the real threat to grass roots political movements with modest resources and their right to reach the public's ears, this case would be laughable.

History teaches us that a stringent control of political debate on a minute formal point, without any relationship to the

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shall consist of the candidate's spouse and issue. Any such expenditure shall not be deemed a contribution to any committee."

[26] "If the sole function of [the disclosure requirement] were to aid in the enforcement of [the independent expenditure ceiling, which was found to be unconstitutional], it would no longer serve any governmental purpose." *Buckley* v. *Valeo*, supra, 424 U.S. 76.

dangers of money controlling democratic government, presents a grave threat to our liberties. A history of the use of disclosure laws against civil rights groups, detailed in such cases as *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958), illustrates how those in power may attempt to impede vigorous debate of political issues by the application of such laws.

We should remember the words of Benjamin Franklin when he was asked what kind of government we created in 1787. He replied, "A republic, if you can keep it." Respectfully Quoted (S. Platt ed., 1992) p. 299. Free elections and the vigorous debate essential to them are the essence of our republic. That is why freedom of speech was protected in the first amendment in 1791. Seymour's seeking public office against entrenched political parties in a small Connecticut town was entitled to protection from undue interference by the commission. I find the statute as applied violated that right.

I respectfully dissent.

APPENDIX B

STATE OF CONNECTICUT
SUPREME COURT

No. SC 16167

GABRIEL SEYMOUR ET AL.

v.

STATE OF CONNECTICUT
ELECTIONS ENFORCEMENT
COMMISSION : FEBRUARY 7, 2001

ORDER

THE MOTION OF THE PLAINTIFFS, FILED DECEMBER 28, 2000, FOR RECONSIDERATION EN BANC AND FOR REARGUMENT, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED **DENIED**. KATZ AND VERTEFEUILLE, JS., DID NOT PARTICIPATE IN THE CONSIDERATION OR DECISION OF THE MOTION.

BY THE COURT,

/s/
CHIEF CLERK

NOTICE SENT: FEBRUARY 7, 2001
BRENNER, SALTZMAN & WALLMAN, LLP
ELIOT D. PRESCOTT, ASSISTANT ATTORNEY GENERAL
PHILIP D. TEGELER
MARTIN B. MARGULIES
CLERK, HARTFORD J.D. (CV98-0579752)
HON. ROBERT F. MCWEENY
RJD

243/001244

APPENDIX C

CV98 0579752

GABRIEL SEYMOUR and ROBERT REID	:	SUPERIOR COURT
v.	:	JUDICIAL DISTRICT OF HARTFORD AT NEW BRITAIN
STATE OF CONNECTICUT ELECTIONS ENFORCEMENT COMMISSION	:	DECEMBER 16, 1998

MEMORANDUM OF DECISION

The plaintiffs appeal pursuant to the Uniform Administrative Procedure Act (UAPA), § 4-166 et seq. § 4-183, from a decision by the State of Connecticut Elections Enforcement Commission (Commission) finding them in technical violation of Connecticut election laws (General Statutes § 9-333w) for failing to indicate "Paid for by" on certain press releases. The Commission's decision of March 18, 1998 did not fine or otherwise penalize the plaintiffs, merely ordering their prospective compliance with the statute.

The plaintiffs were candidates for Selectmen position in the November 4, 1997 municipal election in the Town of Canaan, Connecticut. Complaints were made against the plaintiffs on September 16, 1997 and October 2, 1997.[1] The latter complaint was treated as an amendment by the Commission. The complaints were initiated by a political opponent. One of the allegations of the complaint was that transmittal letters in certain mailings should have contained the attribution language ("Paid for by") that the insert included. The remaining allegation related to press releases of September 3 and September 12, 1997, which were faxed to four local newspapers. The plaintiffs, names and telephone numbers were noted but the specific attribution "Paid for by" was omitted.

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[1] The plaintiffs in their argument also reference a related third complaint (DeMazza Complaint), which is not the subject of the appeal.

The complaint to the Commission was heard as a contested case on January 14, 1998. The Commission hearing officer found that the plaintiffs had met the attribution requirements of § 9-333w[2] with respect to the transmittal letters which included a properly attributed enclosure. The conclusion as to the faxed press releases was set forth in paragraph 17 of that decision:

> It is therefore found that the failure of the September 3 and September 12 press releases to contain the words "Paid for by" and the names and addresses of both Respondents constitutes a violation of Section 9-333w. These violations were of a technical nature by virtue of the fact that all four newspapers receiving the releases knew, or readily could have found out, that the communications were prepared and paid for by the Respondents as both Respondents' names and telephone numbers appeared on the releases as "Contacts". Similarly the fax source number appears on both releases by reference to Ms. Seymour's name.

(Return of Record (ROR) R 67, p. 4.)

The Commission's order based on the technical nature of the violation was: "That the Respondents (Plaintiffs in this case) shall henceforth comply with the disclosure requirements of Section 9-333w of the Connecticut General Statutes by placing on any typed, written or printed press release the words of attribution required by Section 9-333w."

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[2] General Statutes § 9-333w states in pertinent part: "(a) No individual shall make or incur any expenditure with the cooperation of, at the request or suggestion of, or in consultation with any candidate, candidate committee or candidates agent, and no candidate or committee shall make or incur any expenditure for any written, typed or other printed communication which promotes the success or defeat of any candidate's campaign for nomination at a primary or election or solicits funds to benefit any political party or committee unless such communication bears upon its face the words "paid for by" and the following: (1) In the case of such an individual, the name and address of such individual; (2) in the case of a committee other than a party committee, the name of the committee and its campaign treasurer; or (3) in the case of a party committee, the name of the committee."

The plaintiffs though not subject to any sanction by the order are aggrieved because of the risk, however remote, of criminal penalties for elections law violation, General Statutes § 9-333y. See, on aggrievement *Board of Pardons v. Freedom of Information Commission*, 210 Conn. 646, 650 (1989); *State Library v. Freedom of Information Commission*, 240 Conn. 824, 834 (1997).

The plaintiffs in their appeal essentially raise three claims all of a constitutional nature: (1) a challenge to the legislative control over the Commission's membership; (2) a challenge to the statutory authorization of disclosure of complaints of election law violations and (3) a challenge to the alleged selective application of the election laws to plaintiffs' press releases.

The plaintiffs' challenge to the Commission's composition is based on the separation of power provisions of Articles Second and Fourth of the Connecticut Constitution. Article Fourth vests executive power in the Governor. Article Second provides for the separation of powers among the Executive, Legislative and Judicial branches of government.

The Commission consists of five members, four of whom are appointed by the Legislature, § 9-7(a). The remaining member is appointed by the Governor.

The plaintiffs assert that the Commission which performs an executive branch law enforcement function, is undermined by legislative appointment of the majority of its members.

The plaintiffs find support for this claim under a federal case, *Buckley v. Valeo*, 424 U.S. 1 (1976). The *Buckley* decision found the original Federal Elections Commission unconstitutional because of a similarly legislatively appointed majority membership.

The plaintiffs acknowledge that *Buckley* was decided on the basis of the Appointments Clause of the United States

Constitution, Art. II § 2 clause 2[3] which has no counterpart in the Connecticut Constitution. The challenge to the Commission thus rests solely on a separation of powers analysis. There is no Connecticut precedent which suggests that legislative appointments of commissions which serve executive functions violates the separation of powers provisions. This is the case even in the face of numerous instances of legislative appointments of similar commission memberships.[4]

The long Connecticut history of shared appointive power was noted in Connecticut Attorney Generals Opinions (Attorney General Opinion, February 11, 1996, and Opinion 90-13, April 17, 1990).

The Connecticut Supreme Court has repeatedly held: "Recognizing that executive, legislative and judicial powers frequently overlap, we have consistently held that the doctrine of the separation of powers cannot be applied rigidly." *Bartholomew v. Switzer*, 217 Conn. 671, 676 (1991); *University of Connecticut Chapter AAUP v. Governor*, 200 Conn. 386, 394 (1986); *Adams v. Rubinow*, 157 Conn. 150, 155 (1968); *In Re Application of Clark*, 65 Conn. 17, 38 (1894). "As we have recognized, the great functions of government are not divided in any such way that all acts of the nature of the function of one department can never be exercised by another department, such a division is impractical, and if carried out would result in the paralysis of government." *Massameno v. Statewide Grievance Committee*, 234 Conn. 339, 533 (1995).

In states that have considered the separation of powers challenge to a shared legislative executive appointive power, the plaintiffs can find no comfort. See *Board of Ethics v. Green*, 566 So.2d 623 (La. 1990); *Pennsylvania State Assn. of Township Supervisors v. Thornbury*, 405 A.2d 614 (Pa. Conn. 1979)

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[3] "The President shall nominate, and . . . shall appoint . . . all other officers of the united States.

[4] See § 1-80 State Ethics Commission; State Properties Review Board 4b-3; State Commission on the Arts § 10-369; Connecticut Lottery Corp. § 12-802; Connecticut Siting Council § 16-50.

aff'd 437 A.2d 1 (1979); 1 N. Singer, Sutherland Statutes and Statutory Construction, § 3.20 at 76 (4th ed. 1985).

The federal law is distinguishable on the basis of the appointments clause, the majority rule in other states supports a shared appointive power and Connecticut authority rejects a rigid application of the separation of powers doctrine.

The plaintiffs have failed to demonstrate the unconstitutional composition of the Commission.

The plaintiffs allege that pre-hearing publicity violated their constitutionally protected freedoms of speech and association, and their Fourteenth Amendment rights to due process of law. The crux of this claim is that complaints to the Commission resulted in a disclosure of political associations and unfavorable publicity concerning unsubstantiated charges.

The plaintiffs correctly cite *NAACP v. Alabama*, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958) for the proposition that political association is protected from government interference. However, *NAACP v. Alabama*, is clearly distinguishable from the instant case. *NAACP* involved a state court order which required the civil rights organization to disclose its membership. The hostile state environment and limited legitimate interest of the state in membership rosters,[5] contrasts markedly with the incidental nature of disclosure of names in the Commission's enforcement proceeding. Subjecting the statute § 9-7(f) to the strictest scrutiny does not

[5] In *NAACP* the Court held at 351 U.S. 462-63: "Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these circumstances, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure."

invalidate it. The state has a critical interest in the electoral process, which justifies any indirect limit on political association which may incidentally result from disclosure of the names of persons associating for political purposes.

Section 9-7b(14) merely reflects the public policy in favor of open government and free access to public records. The overarching policy of the Freedom of Information Act, § 1-10 et seq., (FOIA) is "the open conduct of government and free public access to government records." *Wilson v. FOIC*, 181 Conn. 324, 328 (1986); *Maher v. FOIC*, 192 Conn. 310, 315 (1984); *Chairman v. FOIC*, 217 Conn. 193, 196 (1991). "The general rule under the [FOIA] is disclosure with exceptions to the rule being narrowly construed." *Perkins v. FOIC*, 228 Conn. 158, 167 (1993); *Superintendent v. FOIC*, 222 Conn. 621, 626 (1993); *Rose v. FOIC*, 221 Conn. 217, 232 (1992); *New Haven v. FOIC*, 205 Conn. 767, 775 (1988). Section 9-7(b)(14) merely applies the FOIA principles to Commission records, with a limited exception for criminal investigations. The plaintiffs have made no showing nor do they even allege political bias as motivation by the Commission.

The plaintiffs selective prosecution claim also fails. In order to demonstrate selective prosecution the plaintiffs must show (1) that similarly situated persons were treated differently; and (2) that such selective treatment was based on impermissible consideration or to punish the exercise of constitutional rights or acts of malicious or bad faith intent. *Schnabel v. Tyler*, 230 Conn. 735, 762 (1994); *FSK Drug Corp. v. Perales*, 960 F.2d 6, 10 (2d Cir. 1992); *LeClair v. Saunders*, 627 F.2d 606, 608 (2d Cir. 1980).

The plaintiffs claim that candidates for the Connecticut State Senate sent similar press releases which lacked for "Paid for by" attribution. The plaintiffs in no instance are able to identify any other press release or candidate that was brought to the Commission's attention and treated differently. Similar situated persons would be candidates against whom a complaint was filed with the Commission.

The plaintiffs assert a political outsider status as a motivation, but fail completely to assign such intent to the Commission. The motivation of their political opponents in Canaan is not automatically attributable to the State.

The plaintiffs also attack the applicability of § 9-333w to the "press releases." The plaintiffs' claim that the exception of § 9-333w(c)[6] is applicable. This exception is clearly directed to the publisher not the candidate. The freedom of a newspaper to publish materials originating in a press release does not relate back to a candidates obligation to include the "Paid for by" attribution on its materials.

The decision is affirmed and the appeal is dismissed.

/s/, J.
Robert F. McWeeny

[6] General Statutes § 9-333w(c) states: "The provisions of subsections (a) and (b) of this section do not apply to (1) any editorial, news story, or commentary published in any newspaper, magazine or journal on its own behalf and upon its own responsibility and for which it does not charge or receive any compensation whatsoever, (2) any banner, (3) political paraphernalia including pins, buttons, badges, emblems, hats, bumper stickers or other similar materials, or (4) signs with a surface area of not more than thirty-two square feet."

APPENDIX D

STATE OF CONNECTICUT
STATE ELECTIONS ENFORCEMENT COMMISSION

In The Matter of a Complaint by
James P. McGuire, Falls Village

Final Decision

Gabriel Seymour, Respondent
Route 126, No. 200
Falls Village, CT 06031

and

Robert Reid, Respondent
200 Johnson Road
Falls Village, CT 06031

File No. 97-252
March 18, 1998

The above captioned matter was heard on January 14, 1998 as a contested case pursuant to Chapter 54 of the Connecticut General Statutes, Section 9-7b of the Connecticut General Statutes, and Section 9-7b-35 of the Regulations of Connecticut State Agencies. The hearing was held before the undersigned pursuant to notice served upon the parties, at which time both the State of Connecticut, represented by Attorney Ronald Morgan Gregory, and the Respondents, pro se, appeared and presented testimony and documentary evidence on the matter.

After consideration of the entire record, the following proposed findings of facts and conclusions of law are made:

1. This matter was brought to the Commission by two sworn affidavits, dated September 16, 1997 and October 2, 1997, which were filed by the Complainant with the Commission on September 18, 1997 and October 8, 1997 respectively. The Complainant's October 2, 1997 affidavit was treated as an amendment to his September 18, 1997 affidavit of complaint.

2. Both affidavits challenge the legal sufficiency, under Conn. Gen. Stats. Sec. 9-333w, of four different typed or printed communications prepared and distributed by the

Respondents in connection with last year's municipal elections. The dates of the printed communications at issue are August 25, September 3, September 12, and September 18, 1997, respectively.

3. By way of background, the town of Canaan has a selectmen/town meeting form of government and Falls Village is a post office within the town of Canaan. Respondent Gabriel Seymour was a candidate for First Selectman during the Town of Canaan's November 4, 1997 municipal election. Respondent Robert Reid was a candidate for the Board of Selectmen in the same election.

4. Both Respondents self-funded their own campaigns by filing timely Certifications of Exemption from Forming a Candidate Committee with the town clerk of Canaan.

5. The August 25, 1997 mailing consisted of a one page letter, signed by both Respondents, referencing and enclosing an insert which set forth the positions and biographies of both Respondents and four other Republican Party candidates in the November 4, 1997 election. Both the letter and the insert were placed inside a single envelope and mailed to certain persons at minimal expense (less than $50.00). No attribution appeared at the bottom of the introductory letter but an attribution appeared at the bottom of the reverse side of the one page, two-sided insert, as follows: "(Paid for by Gabriel Seymour, Route 126; Bob Reid, Johnson Road; Tom Coolidge, Beebe Hill Road; Ruth Hadsell, Dublin Road; Bill Jenks, Cobble Road; Gail Sinclair, Barnes Road, Falls Village CT 06031)". The cost of the entire mailing was paid for equally by all of the six candidates, as reflected on the foregoing attribution.

6. The September 18, 1997 mailing similarly consisted of a letter signed by both Respondents specifically referencing and enclosing a one page, one-sided position paper of both Respondents, but which did not reference any other candidates. The insert set forth the following attribution: "(Paid for by Gabriel Seymour, Route 126, Falls

Village, 06031 and by Bob Reid, Johnson Road, Falls Village CT 06031)", but the introductory letter did not. The letter and insert were placed inside a single envelope, mailed at minimal expense (less than $50.00) to the targeted audience, and the mailing was paid for equally by both Respondents as reflected on the attribution.

7. The State contended at the hearing that both the signed August 25 and September 18 letters were required to contain the same attribution as their enclosures because, although mailed in the same envelope, both letters and enclosures were not stapled together and therefore constituted separate communications.

8. There was no evidence adduced at hearing concerning whether the August 25 or September 18 letters were stapled to the enclosures which they referenced. Further, the two cases cited by the State, the Findings and Conclusions in File No. 89-223 and the Final Decision in File No. 89-231, are both inapposite here in that both cases involve separate flyers which were distributed by individuals door-to-door.

9. Where, as here, a cover letter specifically references a typed or printed communication which is enclosed in the same envelope which is mailed, such documents shall be presumed to constitute a single communication in the absence of evidence showing that both documents have different funding sources.

10. It is therefore concluded that the Respondents fully satisfied the attribution requirements set forth in Conn. Gen. Stats. Sec. 9-333w with respect to the typed or printed communications dated August 25 and September 18, 1997.

11. The hearing on this matter also concerned two press releases, dated September 3 and September 12, 1997, both of which were printed off of a computer and then faxed to each of four local newspapers covering the Town of Canaan. The expense for these press releases were shared

equally by both Respondents and the releases set forth both Respondents' names and telephone numbers, but contained no other attribution.

12. Section 9-333w, Connecticut General Statutes, provides in pertinent part that ". . . no candidate shall make or incur any expenditure for any written, typed or other printed communication which promotes the . . . candidate's . . . election . . . unless such communication bears upon the face the words "paid for by" . . . and . . . the name and address of such individual . . .".

13. The Respondents first contend that Section 9-333w does not apply to the September 3 and September 12, 1997 press releases by virtue of the fact that they were distributed by fax machine to the newspapers in question.

14. It is found that that the requirements of Section 9-333w apply to a fax distribution of a written, typed or other printed communication prepared by the Respondents' campaigns.

15. Respondents next contend that the requirements of Section 9-333w do not apply to these press releases by virtue of the exemption set forth in Section 9-333w(c) which states that ". . . (t)he provisions of . . . this section do not apply to (1) any editorial, news story, or commentary published in any newspaper, magazine or journal on its own behalf and upon its own responsibility . . .".

16. The press releases in question were not published by any newspaper and were prepared on behalf of the Respondents' campaigns, not by a bona fide press entity. While a republication of these releases by a press entity would not be required to bear on its face any attribution, this exception is inapplicable to the original distribution of the release by the Respondents themselves.

17. It is therefore found that the failure of the September 3 and September 12 press releases to contain the words "Paid for by" and the names and addresses of both Respondents constitutes a violation of Section 9-333w.

These violations were of a technical nature by virtue of the fact that all four newspapers receiving the releases knew, or readily could have found out, that the communications were prepared and paid for by the Respondents as both Respondents' names and telephone numbers appeared on the releases as "Contacts". Similarly the fax source number appears on both releases by reference to Ms. Seymour's name.

18. The Respondents further contend that the issues raised in this complaint do not, in any event, constitute violations of Chapter 150 as a matter of law because the complaint was filed for politically motivated reasons and because the claimed violations, at most, constitute technical violations of Chapter 150 of the election laws.

19. The Complainant, as the husband of the Chair of the Falls River Democratic Town Committee, may have been politically motivated to file the instant complaint but political motivations are not a relevant inquiry for purposes of this Commission's hearing. In this regard, political motivations, good or bad, do not deny citizens either the right or standing to file a complaint with this Commission when such complaint otherwise alleges a violation of the election laws.

20. Further, the Commission has jurisdiction to investigate, hear and decide even technical violations of Chapter 150 of the election laws.

ORDER

The following Order is hereby recommended on the basis of the foregoing Findings of Fact and Conclusions of Law:

1. That the Respondents shall henceforth comply with the disclosure requirements of Section 9-333w of the Connecticut General Statutes by placing on any typed, written or printed press release the words of attribution required by Section 9-333w.

Adopted by order of the State Elections Enforcement Commission on March 18, 1998.

/s/ Lois E. Blackburn

Lois E. Blackburn
Clerk of the Commission

I certify that the preceding notice and final decision were sent to respondents Gabriel Seymour, Route 126, No. 200 Falls Village, CT 06031 and Robert Reid, 200 Johnson Road, Falls Village, CT 06031 certified and regular mail, on March 18, 1998.

/s/ Lois E. Blackburn

Lois E. Blackburn
Clerk of the Commission

APPENDIX E

Gabriel Seymour (860) 824-1412 Immediate Release
Bob Reid (860) 824-1125

SEYMOUR AND REID UNVEIL PLANS TO IMPROVE LOCAL GOVERNMENT

Falls Village, Sept. 3, 1997 — Town Selectmen nominees Gabriel Seymour and Bob Reid, who won a surprise upset victory at the Republican Party Caucus here in July, today detailed their plans to rejuvenate the village's government. Both candidates have been active for several years in citizen efforts to improve town planning and open up discussion of public issues, but their efforts have been rebuffed by disinterest and stalling from town officials.

In what they described as their "Platform for Falls Village," Seymour and Reid listed ten specific reforms they said they would implement immediately after taking office in January.

"These are not typical pie-in-the-sky political promises made before Election Day and quickly forgotten afterwards," they said in a joint statement. "This is a list of very specific actions which citizens can observe, participate in, and judge for themselves. If we are elected, the taxpayers of Falls Village will begin to see results within 30 days. We mean business."

#

("Platform for Falls Village" attached.)

SEYMOUR-REID PLATFORM FOR FALLS VILLAGE

1. Model Code of Ethics. Adoption of Connecticut's Model Code of Ethics covering conflict of interest and ethical issues for municipal officeholders will be presented for discussion at the first Town Meeting to be held in 1998.

2. Quarterly Taxpayer Information Meetings. Regular Town Meetings will be scheduled to permit all taxpayers to hear reports on current programs and town finances, and to encourage participation in discussion of future town planning.

3. Response to Taxpayer Letters. Every letter written by a town taxpayer to the First Selectman will be acknowledged within 72 hours of its receipt.

4. Tax Reduction Initiatives. A comprehensive program to attract environmentally-friendly businesses; seek more funding grants; increase state and federal aid; and prevent erosion of the town's existing tax base will be developed and openly discussed at Town Meetings on an ongoing basis.

5. Creation of Economic Opportunity. Young people in Falls Village will be encouraged and assisted to develop entrepreneurial skills and start their own businesses so they can continue to live here.

6. Technology Learning Center. Full support will be given to the Board of Education to develop a new Media Center at Kellogg School to serve as an after-hours computer and internet learning and business resource for community residents of all ages.

7. Establishment of Community Website. Town residents will be given immediate access to information about town government through a new official Town internet website. The Falls Village website will also supply information about the Town and its resources to visitors, summer residents, new arrivals, and potential business property buyers.

8. Pursuit of Educational Excellence. Affirmative encouragement will be given to parent, teacher and Board of Education efforts to provide the best possible education we can afford for our children.

9. Preservation of Our Heritage. New initiatives to protect our historic landmarks, our downtown historic district, and our natural beauty and resources will be offered for taxpayer consideration at Town Meetings during 1998.

10. Long-Range Capital Planning. In order to develop effective capital planning and realize long term savings, a 3-year capital plan will be prepared and presented for taxpayer discussion covering major capital expenditures facing the town, including: expansion of town recreation services for all age groups from kindergarten to senior citizens; a new or satellite firehouse; construction of a State-mandated salt shed maintenance requirements for the Kellogg School building; and other citizen recommendations to improve town programs and services.

Contacts:

Gabriel Seymour (860) 824-1412
Bob Reid (860) 824-1125

Immediate Release

SEYMOUR AND REID PLEDGE QUICK ACTION ON CODE OF ETHICS FOR FALLS VILLAGE

Falls Village, Sept. 12 — Selectmen nominees Gabriel Seymour and Robert Reid, Republican candidates who won an upset victory over the party organization's candidates at the open Republican caucus in July, charged today that the town's present Board of Selectmen has failed to adopt a Model Code of Ethics for over two years.

"Stalling, delay and inaction have characterized Falls Village government for too long," Seymour and Reid said in a joint statement. "When something as important as a Code of Ethics for town officials is swept under the rug, you know the time has come for a change."

The State Ethics Commission, acting under mandate from the Connecticut Legislature, distributed a proposed Code of Ethics to all towns and special districts in August, 1995. A principal goal of the new Code was to bar public officials who have financial or personal conflicts of interest from participating in official votes or actions. The Falls Village Board rejected the proposed Code, but promised at a meeting on November 13, 1995 to prepare a simpler version. No simpler version was ever enacted, and the matter was allowed to die a quiet death until revived today by Republican candidates Seymour and Reid.

"Adopting a Code of Ethics for Falls Village will be our top priority," Seymour and Reid said. "The first step in restoring public confidence in town government is establishing a clear set of rules every official must follow. The voters are entitled to know the rules under which we will operate, and to insist all Town officers live up to those rules.

"The reasons Falls Village needs a code of ethics were well stated by the State Ethics Commission," the Selectmen

nominees said. "Public office is a public trust. The trust of the public is essential for government to function effectively. Public policy developed by government officials and employees affects every citizen of the municipality, and it must be based on honest and fair deliberations and decisions. The process must be free from threats, favoritism, undue influence, and all forms of impropriety so that the confidence of the public is not eroded.

"Falls Village should adopt a Code of Ethics to increase the confidence of our citizens in the integrity and fairness of their government," Seymour and Reid said.

Supreme Court, U.S.
FILED
MAY 31 2001
CLERK

No. 00-1660

In The
Supreme Court Of The United States
October Term, 2000

GABRIEL SEYMOUR and ROBERT REID,
Petitioners

v.

STATE OF CONNECTICUT ELECTIONS ENFORCEMENT COMMISSION,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD BLUMENTHAL
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OF CONNECTICUT

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QUESTIONS PRESENTED

1. Did the Connecticut Supreme Court properly conclude that this Court's holding in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) applies to anonymous pamphleteering relating to referenda and other issue-based ballot measures, but does not apply to campaign literature distributed during candidate elections?

2. Did the Connecticut Supreme Court properly conclude that Section 9-333w of the Connecticut General Statutes is narrowly tailored to serve compelling state interests?

3. Did the Connecticut Supreme Court properly conclude that individuals who make expenditures on behalf of candidates for elective office, including the candidates themselves, may be required to disclose their identities even if the expenditures are *de minimis*?

4. Did the Connecticut Supreme Court properly conclude that the Connecticut Election Enforcement Commission's handling of citizen complaints against the petitioners did not violate due process?

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APPENDIX A-1

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COUNTERSTATEMENT OF THE CASE

This case concerns the constitutionality of a Connecticut statute that requires individuals and other entities who make expenditures on campaign literature promoting the success or defeat of a candidate for elective office to disclose their identities and state "paid for by" on the face of the communication. The statute at issue, Conn. Gen. Stat. §9-333w(a), provides in pertinent part that:

> No individual shall make or incur any expenditure with the cooperation of, at the request or suggestion of, or in consultation with any candidate, candidate committee or candidate's agent, and no candidate or committee shall make or incur any expenditure for any written, typed or other printed communication which promotes the success or defeat of any candidate's campaign for nomination at a primary or election or solicits funds to benefit any political party or committee unless such communication bears upon its face the words "paid for by" and the following: (1) In the case of such an individual, the name and address of such individual . . . .

Significantly, nothing in this narrowly drawn statute imposes an attribution requirement on communications that do not promote the success or defeat of a particular candidate's campaign. Thus, for example, written materials that are distributed in connection with a referendum or other non-candidate election are not covered by this section of the statute. In addition, nothing in the statute prohibits

an individual from making anonymous expenditures promoting the success or defeat of a candidate as long as the expenditures are not made with the cooperation of, at the request or suggestion of, or in consultation with, a candidate, candidate committee or candidate's agent. Thus, written campaign materials that are paid for by individuals acting independently of a candidate or committee need not disclose the name of the individual making the expenditure. Finally, it is important to note that the statute does not require disclosure of the identity of the person who authored the communication, only the person who paid for the communication.

Because the petitioners did not challenge this statute's constitutionality prior to their appeal to the Connecticut Supreme Court, there is no factual record either from the trial court or the administrative proceedings below that specifically pertains to the petitioners' claims. As a result, the petitioners' "Statement of the Case" is filled with purported "facts" that are either not supported by the record or constitute gross misstatements of the findings below. Accordingly, pursuant to Rule 15.2 of the Supreme Court Rules, the respondent State Elections Enforcement Commission (the "Commission") submits this Counterstatement of the Case, setting forth those facts that are clearly supported by the record and identifying for the Court the many misstatements in the petitioners' brief for which there is no evidentiary support whatsoever.

A. The Facts Based On The Record

The petitioners were endorsed Republican party candidates for municipal office in Canaan, Connecticut, in the November 4, 1997 election. (Petitioners' Appendix, hereinafter "Pet. App.," at A-42, ¶¶3, 5). During the course of their self-funded campaigns,[1/] the petitioners prepared two press releases, dated September 3, 1997, and September 12, 1997, on a personal computer and faxed them to four local newspapers. (Pet. App. D at A-42, ¶4; A-43, ¶11). Although the press releases contained the petitioners' names and telephone numbers, neither release identified the petitioners as the individuals who had paid for them. (*Id.*)

On September 18, 1997, the respondent State Elections Enforcement Commission received a complaint that the petitioners had violated Conn. Gen. Stat. §9-333w(a) by failing to disclose on their press releases the identity of the individuals who had paid for them. (Pet. App. D at A-41, ¶¶1, 2) The Commission received a second complaint on October 8, 1997, which it treated as

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1/ A self-funded campaign is a campaign in which a candidate for elective office files a certification with a designated public official stating that he is financing his campaign entirely from personal funds and will not solicit or receive contributions. Conn. Gen. Stat. §9-333f(b). Such a candidate is excused from statutory requirements that he form a candidate committee, file statements of contributions and expenditures, and designate a depository institution to accept campaign funds. *Id.*; Conn. Gen. Stat. §9-333d(a)

an amendment of the first complaint (Pet. App. D at A-41, ¶1).

On January 14, 1998, a Commission hearing officer conducted a contested evidentiary hearing on the complaints. (Pet. App. D at A-41.) The hearing officer's report, issued on March 3, 1998, concluded that the petitioners' failure to include the words "paid for by," followed by the name and address of the party who had paid for the press releases, constituted a technical violation of Conn. Gen. Stat. §9-333w(a). (Pet. App. D at A-44, ¶17). The hearing officer recommended that the Commission order the petitioners to henceforth comply with Conn. Gen. Stat. §9-333w(a), but imposed no other sanctions. (Pet. App. D at A-45.) On March 18, 1998, the Commission unanimously adopted the hearing officer's report as a final decision of the Commission. (Pet. App. D at A-46.)

In their administrative appeal to the Connecticut Superior Court, the petitioners challenged the Commission's ruling on various state law grounds. (Pet. App. C at A-36.) At no time during these proceedings, or during the prior proceedings before the Commission, did the petitioners claim that the disclosure requirement contained in Conn. Gen. Stat. §9-333w(a) violated the First Amendment. On December 16, 1998, the Superior Court issued a decision rejecting the petitioners' claims and affirming the decision of the Commission. (Pet. App. C at A-34 to A-40.)

After losing in the Superior Court, the petitioners appealed to the Connecticut Appellate Court. Prior to any proceedings in the Appellate Court, the Connecticut Supreme Court transferred the case to its own docket pursuant to Practice Book Rule 65-1. In their appeal, the petitioners claimed for the first time that the disclosure requirement set forth in Conn. Gen. Stat. §9-333w(a) violated the First Amendment of the U.S. Constitution under *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995). (Pet. App. A at A-3). The petitioners also argued that the Commission's handling of the complaints violated the petitioners' rights to free speech and due process and that the composition of the Commission violated Connecticut's separation of powers doctrine. (*Id.*)

The Connecticut Supreme Court rejected all of the petitioners' claims. (Pet. App. A at A-4). In a carefully reasoned opinion, the court found that Conn. Gen. Stat. §9-333w(a), unlike the statute at issue in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), only applied to candidate elections and was narrowly drawn to serve compelling state interests. (Pet. App. A at A-1 to A-22). Accordingly, the court upheld the statute's constitutionality and affirmed the trial court's judgment finding the petitioners in technical violation of the disclosure requirement. (Pet. App. A at A-28). The court further found that the manner in which the Commission handled the complaints concerning the petitioners' lack of disclosure did not violate the petitioners' constitutional

rights and the composition of the Commission did not violate Connecticut's separation of powers doctrine. (*Id.*)

B. The Petitioners' Brief Is Filled With Misstatements And Alleged "Facts" For Which There Is No Evidentiary Support Whatsoever

Rather than simply setting forth the facts that are supported by the record, the petitioners have liberally embellished their "Statement of the Case" with immaterial and inaccurate allegations for which there is absolutely no evidentiary support whatsoever.

In particular, there is absolutely no support in the record for the petitioners' allegations that the complaints filed with the Commission were used as "major campaign strategic attack weapons" by political opponents, that the Commission improperly disclosed the complaints, that the complaints produced "intense adverse publicity" in the local press, that the Governor's appointee to the Commission is usually outvoted 4-to-1, or that the Commission's make-up is similar to that of the original Federal Election Commission. *See* Petitioners' Brief at 6-7. Nor is there any basis for the erroneous implication that the petitioners were unaffiliated challengers, rather than endorsed Republican Party candidates, and none of the alleged "facts" contained in the first two paragraphs on page 5 of the petitioners' brief that purport to describe the Falls Village section of the Town of Canaan is contained in any of the findings below.

Furthermore, the entire paragraph on page 8 of the petitioners' brief that begins "[m]ost local boards of election in this country are staffed by political party loyalists," has no record basis whatsoever. On the contrary, it represents the petitioners' personal, biased view of municipal politics and its inclusion in what purports to be the petitioners' statement of the case is wholly inappropriate. For purposes of the present petition, it and all other factual fabrication and embellishment by the petitioners should be ignored.

REASONS FOR DENYING THE WRIT

I. THIS IS NOT AN APPROPRIATE CASE FOR SUPREME COURT REVIEW BECAUSE THE FACTUAL RECORD IS INADEQUATE

Despite numerous opportunities during the proceedings before the Commission and the trial court, the petitioners failed to raise their claim that the disclosure requirements of Conn. Gen. Stat. §9-333w(a) violate the First Amendment until they filed their appeal with the Connecticut Appellate Court.[2] As a result, the factual record to which this Court would necessarily look in ruling on the merits of the petitioners' claim is woefully inadequate

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2/ The petitioners' contention that they raised the issue in a letter to a Commission staff attorney (as if this would somehow suffice) is directly contradicted by their admission during oral argument before the Connecticut Supreme Court that they had failed to raise the issue below.

The responsibility for providing this Court with an adequate record rests with the petitioners. *Deines v. Vermeer Manufacturing Co.*, 969 F.2d 977, 978 (10th Cir. 1992); *Abood v. Block*, 752 F.2d 548, 549 (11th Cir. 1985). Because the petitioners failed to challenge the constitutionality of the disclosure requirement in the trial court, no evidence was introduced concerning the compelling state interests that justify the requirement. Recognizing this deficiency in the record, the Connecticut Supreme Court permitted the Commission to set forth in its brief any facts that it would have attempted to prove in the trial court to support its position that Conn. Gen. Stat. §9-333w(a) is constitutional had the petitioners presented the issue in a timely manner. (Respondent's Appendix at A-1). Although the Commission provided the facts requested and the court ruled accordingly, the procedural posture was far from ideal.

The same problem is presented again by the current petition because there is no evidence in the record concerning the circumstances in which the petitioners now claim the statute is overbroad and the Commission has had no opportunity to make a factual record to support its defense of the statute's constitutionality. Indeed, for this Court to review the claim, it would have to permit the Commission to refer to any fact outside the record that supports the statute's constitutionality. Thus, in the absence of an adequate record on these issues, any review by this Court would be wholly inappropriate.

II. THE CONNECTICUT SUPREME COURT'S DECISION DOES NOT CONFLICT WITH *MCINTYRE v. OHIO ELECTIONS COMMISSION* OR ANY OTHER DECISION OF THIS COURT

Contrary to the petitioners' claims, nothing in the Connecticut Supreme Court's ruling in this case is in any way inconsistent with this Court's decision in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), or any other Supreme Court decision interpreting the First Amendment.

In its decision, the Connecticut Supreme Court recognized that "political speech is at the nucleus of the protection afforded by the first amendment" and "is given the highest level of scrutiny under our rubric of judicial review." *Seymour v. Elections Enforcement Commission*, 255 Conn. 78, 83-84 (2000), Pet. App. A. at A-5. At the same time, however, the court pointed out that:

> Because of the critical role that elections play in our democratic society, the Supreme Court has recognized "that a State indisputably has a compelling interest in preserving the integrity of its election process." . . . [*Burson v. Freeman*, 504 U.S. 191, 199 (1992) (citations omitted; internal quotation marks omitted)] Indeed, "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

Seymour, 255 Conn. at 85-86. Quoting *Buckley v. Valeo*, 424 U.S. 1, 66 (1976), the court noted that "there are

governmental interests sufficiently important to outweigh the possibility of infringement [upon the first amendment], particularly when the free functioning of our national institutions is involved.'" *Seymour*, 255 Conn at 85 (internal quotation marks omitted).

With these overriding principles in mind, the Connecticut Supreme Court subjected Connecticut's disclosure statute to strict scrutiny and concluded that it was justified by four compelling state interests: (1) preventing actual or perceived corruption in candidate elections; (2) advancing the state's ability to investigate and enforce other campaign finance laws; (3) providing the electorate with information about candidates; and (4) deterring fraud and libel. *Seymour*, 255 Conn. at 86-96; Pet. App. A. at A-7 through A-16. The court further found that the statute was narrowly tailored to serve these compelling state interests. *Seymour*, 255 Conn. at 96-103; Pet. App. A at A-16 through A-22. As stated by the court, "the [statute's] intrusion upon any specific individual rights is minor when compared to the benefits gained by, and the importance of, a fair electoral process." *Seymour*, 255 Conn. at 102-03; Pet. App. A. at A-22.

In upholding the constitutionality of Conn. Gen. Stat. §9-333w(a), the Connecticut Supreme Court's decision was entirely consistent with this Court's ruling in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995). At issue in *McIntyre* was the constitutionality of an Ohio election law that prohibited the circulation of unsigned documents designed to influence voters in a

referendum or election. 514 U.S. at 338 n. 3. The Ohio Elections Commission had fined the petitioner, Margaret McIntyre, for distributing anonymous leaflets expressing opposition to an imminent local tax referendum. Ms. McIntyre, unlike the petitioners, was not a candidate for public office and was acting entirely independently of any candidate or committee. In fact, the referendum was essentially a one-time public opinion poll on a tax issue, rather than an election that resulted in the success or defeat of a candidate for public office. Applying strict scrutiny to the Ohio statute, this Court held that Ohio could not, under the circumstances of the case, justify its infringement on Ms. McIntyre's First Amendment right to engage in anonymous political speech.

Significantly, in so holding, this Court's decision in *McIntyre* distinguished laws, such as Connecticut's, that require disclosure of the source of campaign expenditures in **candidate** elections, from those, such as Ohio's, that require such disclosure in connection with **referenda** or other issue-based ballot measures. With regard to candidate elections, this Court explained that

> Required disclosures about the level of financial support **a candidate** has received from various sources are supported by an interest in avoiding the appearance of corruption. [In addition,] **[i]n candidate elections**, the Government can identify a compelling state interest in avoiding the corruption that might result from campaign expenditures. Disclosure of expenditures lessens the risk that individuals will spend money to support a candidate as a

> *quid pro quo* for special treatment after the candidate is in office.

Id. at 354-56 (emphasis added). In contrast, this Court noted that referenda and other issue-based ballot measures simply do not present "[t]he risk of corruption perceived in cases involving candidate elections." *Id.* at 352 n. 15.

The *McIntyre* decision also acknowledged that there is a greater risk of libel or fraud in candidate elections than in non-candidate elections, *id.* at 349, and recognized that the electorate's heightened informational interest in candidate elections justifies disclosure of information regarding both contributions to the candidate and "expenditures authorized by the candidate or his responsible agent." *Id.* at 354.

Thus, far from invalidating all campaign finance disclosure and attribution laws, this Court's ruling in *McIntyre* merely carved out a narrow exception to the constitutionality of statutes mandating disclosure that were upheld and discussed at length *Buckley v. Valeo*, 424 U.S. 1 (1976). Indeed, this Court was careful to limit the reach of its decision, stating that "[o]ur opinion discusses only written communications and, particularly, leaflets of the kind Ms. McIntyre distributed." *McIntyre*, 514 U.S. at 338 n. 3. As Justice Ginsburg noted in her concurring opinion, "[w]e do not hold that the State may not in other, larger circumstances require the speaker to disclose its interest by disclosing its identity." *Id.* at 358 (Ginsburg, J., concurring).

Thus, this Court's ruling in *McIntyre* clearly left the door open for states, such as Connecticut, to enact and enforce disclosure statutes such as Conn. Gen. Stat. §9-333w(a) that apply to candidate elections, but do not apply to referenda or other issue-based ballot measures. In upholding the constitutionality of Conn. Gen. Stat. §9-333w(a), the Connecticut Supreme Court emphasized the limited scope of the statute and properly concluded that it was narrowly tailored to serve compelling state interests. Far from "virtually nullifying any right of anonymous speech for individuals connected with an election campaign" as petitioners contend, Conn. Gen. Stat. §9-333w(a) simply requires a candidate or someone acting in concert with a candidate, who expends money on written material supporting or opposing a particular candidate's election, to disclose his or her identity. A person who is acting *independently* of any candidate, however, may distribute such materials during an election with total anonymity. In addition, *anyone* may distribute written materials anonymously in connection with a referendum or other issue-based ballot issue. To suggest, as petitioners do, that Connecticut's statute eliminates all opportunity for anonymous speech is therefore patently wrong.

Because, as the Connecticut Supreme Court properly concluded, Connecticut's disclosure statute "is limited to elections and party-related solicitations," *Seymour*, 255 Conn. at 88, "does not impede an individual, acting independently of a campaign, from anonymous expression," *id.* at 101, and was in fact amended in 1995

specifically to conform to the *McIntyre* decision, *id.* at 101 n. 14; Pet. App. A. at A-21 n. 14,[3] there is no conflict between the Connecticut Supreme Court's decision and this Court's decision in *McIntyre*. Indeed, the Connecticut Supreme Court's decision is entirely consistent with rulings by other courts concerning similar laws in other states. *See, e.g., Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637 (6th Cir.), *cert. denied*, 118 S.Ct. 162 (1997); *Doe v. Mortham*, 708 So.2d 929 (Fla. 1998). Accordingly, further review by this Court is totally unwarranted.

III. CONNECTICUT'S DISCLOSURE STATUTE IS NOT UNCONSTITUTIONALLY OVERBROAD

Despite the fact that the Connecticut Supreme Court's decision does not conflict with *McIntyre*, the petitioners contend that it should be reviewed because Connecticut's disclosure statute is overbroad and impermissibly applies to (1) expenditures by the candidates themselves; (2) negligible expenditures; (3) political outsiders; and (4) speech that is neither false nor misleading. Contrary to the petitioners' claims, however, the state has a compelling governmental interest in applying the statute to all of these situations

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[3] During legislative discussions on the proposed 1995 amendment, then State Representative Susan Bysiewicz explained that "[t]his amendment is due to a recent United States Supreme Court decision, which now requires Connecticut to revise its election laws with respect to attribution on political campaign advertising and materials." *Seymour*, 255 Conn. at 101 n. 14, quoting 38 Conn. H. R. Proc., Pt. 15, 1995 Sess., p. 5473 (1995).

First, Connecticut's statute appropriately applies to expenditures by candidates and third parties alike because Connecticut has specific laws governing self-funding candidates such as the petitioners, *see* Conn. Gen. Stat. §§9-333d(a) and 9-333f(b), and the attribution requirement helps the state to enforce these laws and prevent fraud. In particular, by requiring disclosure, the state is able to verify that a candidate's campaign is, in fact, self-funded and that the candidate is therefore not required to form a candidate committee, file contribution and expenditure statements, and designate a depository institution to receive his funds. Although the petitioners contend that the Commission could achieve the same objectives with a less restrictive statute applicable only to contributions by third-parties, there is no evidence that reliance on third party disclosures would be anywhere near as effective at preventing fraud or informing the electorate as a requirement that self-funding candidates actively certify to their own expenditures.[4] Furthermore, the fact that Connecticut, unlike Ohio, does not have other laws that specifically prohibit fraud and libel during election campaigns further supports the application of Conn. Gen. Stat. §9-333w(a) to candidates and third parties alike.

The petitioners' contention that the statute impermissibly applies to *de minimis* expenditures is

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[4] Indeed, common sense suggests that campaign literature that discloses that it was paid for by the candidate is far more likely to inform the electorate of the candidate's affiliations or lack thereof than literature with no disclosure whatsoever.

likewise unfounded. In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court explicitly declined to rule on whether disclosure requirements below a certain threshold would violate the First Amendment and instead emphasized that the determination of threshold disclosure amounts is a matter best left to the legislature's discretion. *See Buckley*, 424 U.S. at 83 ("[t]he line is necessarily a judgmental decision, best left in the context of this complex legislation to congressional discretion"). This Court later underscored this point in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 120 S. Ct. 897, 909 (2000), in which it emphasized that "[i]n *Buckley*, we specifically rejected the contention that $1,000, or any other amount, was a constitutional minimum below which legislatures could not regulate." While the petitioners may object to the State's decision to define an expenditure as "anything of value," Conn. Gen. Stat. §9-333c(1), even small expenditures can collectively add up to enormous sums. In short, the issue is a legislative matter with which the petitioners have shown no constitutional basis to interfere.

The petitioners third objection, that the disclosure requirement impermissibly burdens "challengers" who do not have the financial backing of party organizations, is likewise wholly unfounded. Although the petitioners' argument is not entirely clear, they apparently contend that such candidates should be able to fund their campaigns anonymously in order to avoid reprisal from local officials. This suggestion, however, that a self-declared candidate for municipal office, who has purposely injected himself into

the public arena and openly placed his name, address and telephone number on press releases and other campaign literature in the hope of attracting votes, will be less subject to possible reprisal if he is not required to disclose who funded his campaign, is patently absurd. At the very least, there is no evidence to support such a claim and, even if there were, there is no basis for concluding that the state's compelling governmental interests in requiring disclosure would apply any less to such candidates than to any other candidates. Indeed, knowing whether a candidate is acting independently or is the pawn of a larger political organization is precisely the type of information that better enables the electorate to make educated choices and protects the integrity of the electoral process.

Finally, the petitioners' contention that Connecticut's statute is overbroad because it is not limited to speech that is false or misleading is nonsensical. Clearly, the state's compelling interests in deterring and detecting actual or perceived corruption in candidate elections, enforcing other campaign finance laws, providing the electorate with information about the candidates and deterring fraud and libel are equally applicable to all speech concerning a candidate, not just false speech. Indeed, requiring only those candidates and individuals who have paid for false or misleading speech to disclose their identities would effectively eviscerate the law because no one is likely to publicize the fact that he or she is disseminating false or misleading campaign literature.

Given the total absence of any factual or legal basis for concluding that Connecticut's disclosure statute is overbroad, further review by this Court is totally unwarranted.

IV. THE COMMISSION'S HANDLING OF THE COMPLAINTS CONCERNING PETITIONERS' PRESS RELEASES DID NOT VIOLATE DUE PROCESS

The petitioners' final argument, that the Commission's handling of the complaints concerning the petitioners' press releases violated their rights to free speech and due process, has no more basis than any of their other claims.

According to the petitioners, they had a due process right to a pre-election hearing, even though the complaint against them was filed on September 18, 1997, and substantially amended on October 8, 1997, a mere 27 days before the election. In support of their claim, the petitioners do not cite any authority whatsoever. Indeed, relevant caselaw supports precisely the opposite conclusion -- that the Fourteenth Amendment permits the government wide discretion in such matters and governmental actions are presumed to be constitutionally valid. *See, e.g., Presnik v. Berger*, 837 F. Supp. 475, 477-78 (D.Conn. 1993). Moreover, as the Connecticut Supreme Court pointed out, Connecticut law explicitly permitted the Commission to take up to sixty days to respond to the complaint and permitted the petitioners, after the sixtieth day, to seek a court order to show cause why the Commission had not

acted. Conn. Gen. Stat. §9-7a(g). The fact that the petitioners never sought such relief dramatically highlights the weakness of their post-hoc assertion that they were prejudiced by the speed at which the Commission adjudicated their complaint. *See Seymour*, 255 Conn. at 104; Pet. App. A at A-23. Accordingly, the Connecticut Supreme Court properly found no constitutional violation.

The court was likewise appropriately unpersuaded by petitioners' related argument that the Commission improperly publicly disclosed citizen complaints about the petitioners. The court found that the disclosures in question were two newspaper articles that did not appear until after the November 4, 1997 election and discussed complaints that were disposed of by settlement agreement and were not the subject of the present case. *Seymour*, 255 Conn. at 104, Pet. App. A at A-24. Most importantly, the court found "no evidence in th[e] record to support the [petitioners'] claim that any prehearing publicity affected the adjudication of their hearing." *Id.* Under these circumstances, there is no basis for concluding that the Connecticut Supreme Court erred and, in fact, the petitioners cite none. Accordingly, this Court's review of this claim, like all of the petitioners' other claims, is both unnecessary and unwarranted.

CONCLUSION

In sum, this is a case with a wholly inadequate record in which the petitioners inappropriately want this Court to review a state court decision that does not conflict

with *McIntyre v. Ohio Elections Commission*, or any other ruling of this Court, and is, in fact, totally consistent with the rulings of other lower courts concerning similar laws. For all of the reasons set forth herein, the petitioners' petition for a writ of certiorari should be denied.

Respectfully submitted,

RESPONDENT
STATE OF CONNECTICUT
ELECTIONS ENFORCEMENT
COMMISSION

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No. _____

In The
Supreme Court Of The United States
October Term, 2000

GABRIEL SEYMOUR and ROBERT REID,
Petitioners

v.

STATE OF CONNECTICUT ELECTIONS
ENFORCEMENT COMMISSION,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CONNECTICUT

APPENDIX

STATE OF CONNECTICUT
SUPREME COURT
APPELLATE COURT
860-566-8160

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Re: SC 16167 Seymour v. Elections Enforcement Commission

Dear Counsel:

The Court, after argument, ordered that the defendant brief the question of whether the disclosure

requirement of General Statutes §9-333w violates the first amendment to the United States constitution. In its brief, the defendant shall set forth whatever facts it would have been required to prove at a hearing in the trial court in support of its contention that §9-333w is constitutional. The defendant shall file its brief, not to exceed fifteen pages, by January 4, 2000. The plaintiff shall file a responsive brief, not to exceed ten pages, by January 18, 2000. The amicus curiae also may file a brief, not to exceed ten pages, by January 18, 2000.

Very truly yours,

/s/

Francis J. Drumm, Jr.

Supreme Court, U.S.
FILED
JUN 8
CLERK

(3)

No. 00-1660

In the
Supreme Court of the United States

GABRIEL SEYMOUR and ROBERT REID,

Petitioners,

vs.

STATE OF CONNECTICUT ELECTIONS ENFORCEMENT COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

PETITIONERS' REPLY BRIEF

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I

RESPONSE TO ATTORNEY GENERAL'S UNFOUNDED CLAIMS OF "MISSTATEMENTS" BY PETITIONERS

A. Superior Court's Acknowledgment of Constitutional Issues in Administrative Appeal

Supreme Court Rule 14(g)(i) requires that a petition contain "specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; *** so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari." The original petition complies with that rule at pages 8-10 and by setting forth the full text of the state court opinion in the appendix. *See Seymour v. Elections Enforcement Commission*, 255 Conn. 78, 80 *et seq.* (2000).

The respondent, at page 4 of its opposing brief, states:

> In their administrative appeal to the Connecticut Superior Court, the petitioners challenged the Commission's ruling on various state law grounds. (Pet. App. C at A-36). At no time during these proceedings, or during the prior proceedings before the Commission, did the petitioners claim that the disclosure requirement contained in Conn. Gen. Stat. §9-333w(a) violated the First Amendment.

While neither the Election Enforcement Commission, the State Attorney General nor the petitioners brought the *McIntyre* decision to the attention of the Superior Court and specifically discussed the question of its applicability to Conn. Gen. Stat. §9-333w(a), there were a number of explicit constitutional challenges to the EEC proceeding before the Superior Court, including violation of petitioners' First Amendment rights, as reflected in the following excerpts from the Superior Court's opinion (which is printed in full at pages A-34–A-40):

> The plaintiffs in their appeal essentially raise three claims all of a constitutional nature: (1) a challenge to the legislative control over the Commission's membership; (2) a challenge to the statutory authorization of disclosure of complaints of election law violations and (3) a challenge to the alleged selective application of the election laws to plaintiffs' press releases. (A-36)
>
> * * *
>
> The plaintiffs allege that pre-hearing publicity violated their constitutionally protected freedoms of speech and association, and their Fourteenth Amendment rights to due process of law. The crux of this claim is that complaints to the Commission resulted in a disclosure of political associations and unfavorable publicity concerning unsubstantiated charges. (A-38)
>
> * * *
>
> The plaintiffs also attack the applicability of §9-333w to the "press releases." The plaintiffs' claim that the exception of §9-333w(c) is applicable. This exception is clearly directed to the publisher not the candidate. The freedom of a newspaper to publish materials originating in a press release does not relate back to a candidate's obligation to include the "Paid for by" attribution on its materials. (A-40)

There can be no doubt that the EEC proceeding was under strong constitutional challenge by petitioners at the agency level (Petition, p. 9), at the Superior Court level (above), and at the Connecticut Supreme Court level, where respondent readily concedes that a full factual record of "compelling state interests" was made. (Petition, pp. 9-10; Resp. Br. p 8)

B. EEC-Assisted Adverse Publicity Against Petitioners During Election Campaign

The State Attorney General's assertion (at p. 6) that there is "absolutely no evidentiary support whatsoever" for various facts set forth in the petition is demonstrably false B and particularly disturbing since the EEC's Executive Director and General Counsel is named as co-counsel on the face of respondent's brief. Particularly noteworthy is the recklessness of the following statement:

> In particular, there is absolutely no support in the record for the petitioners' allegations that the complaints filed with the Commission were used as "major campaign strategic attack weapons" by political opponents, that the Commission improperly disclosed the complaints, that the complaints produced "intense adverse publicity" in the local press, *** (Resp. Br. at p. 6)

The *McGuire* complaint followed on the heels of an earlier EEC complaint against petitioners publicized at the height of the election campaign in the principal local newspapers circulated in the town where the 1997 municipal election was to take place. The first newspaper story appeared under the following headline on September 4, 1997:

GROUP ACCUSED
OF BREAKING
FINANCE LAWS

A simultaneous news story in a second local newspaper was headlined:

FALLS VILLAGE
COMMITTEE
INVESTIGATED

The latter story quoted *an EEC official* as stating that the first complaint was in the hands of a staff investigator.

That same news story also noted that at the 1997 Republican party caucus the petitioners and other reform candidates "swept way the party-endorsed slate. . . ."

After the *McGuire* complaint (the subject of this proceeding) was filed with the EEC shortly afterwards, a further story appeared in the local press on September 26, 1997, headlined:

2ND COMPLAINT ALLEGES
ELECTION LAWS VIOLATION

Once again, the news story reported *an EEC official* as stating that "both complaints are under investigation."

Contrary to respondent's claims, these newspaper articles *are all part of the Record on Appeal* [R 1 (Exs. XIII and XIV) of Certified Administrative Record on Appeal; R 36 (R.Ex. 10 *id.*)].

C. Facts Judicially Noticeable by the Court

The party make-up of the Elections Enforcement Commission is prescribed by statute (Conn. Gen. Stat. § 9-7(a)).

The factual description of Falls Village appearing on page 5 of the petition is published in the town's annual report.

The staffing of local boards of election by party loyalists is open and notorious.

None of these statements in the petition are "factual fabrications" as alleged by the State Attorney General (Resp. Br. p. 7) but are facts subject to judicial notice (FRE Rule 201(b)) and properly belong before this Court.

II

THE CONNECTICUT STATUTE IS UNCONSTITUTIONAL AS APPLIED AND ON ITS FACE. NO ADDITIONAL EVIDENCE IS REQUIRED BEYOND WHAT IS ALREADY IN THE RECORD

Respondent argues (Resp. Br. p. 8) that "there is no evidence in the record" supporting petitioners' claim that the statute is overbroad.

No evidence is necessary beyond the statute itself and its application to the facts of this case. The relevant facts of this case are well summarized in the minority opinion of the Connecticut Supreme Court at pages A-30–A-31. The words of Chief Judge Sullivan, after summarizing those facts, present the constitutional issue succinctly:

> In the words of the commission itself, this was a "technical violation" that, in ordinary English, translates into action that did not violate the substance of the election law.
>
> The commission endangers vigorous political debate by straining at a gnat. Were it not for the real threat to grass roots political movements with modest resources and their right to reach the public's ears, this case would be laughable.
>
> History teaches us that a stringent control of political debate on a minute formal point, without any relationship to the dangers of money controlling democratic government, presents a grave threat to our liberties. (A-31–A-32)

III

THE ELECTION COMMISSION VIOLATED PETITIONERS' DUE PROCESS RIGHTS BY ASSISTING IN PUBLICIZING ALLEGED ELECTION LAW VIOLATIONS BY PETITIONERS WHILE THE CONTESTED ELECTION CAMPAIGN WAS ONGOING, AND LEAVING THE CHARGES PENDING UNTIL AFTER THE ELECTION HAD TAKEN PLACE

In Point IV of its brief, respondent EEC argues (at p. 19) that petitioners' due process claim based on the Commission's participation in the publicizing of the *McGuire* complaint during the height of the hotly-contested 1997 election campaign, followed by its delay of any hearing until after Election Day when the damage was done, is a "post-hoc assertion that they were prejudiced." However, the plain fact is that the pendency of the unresolved EEC charges coincided with Petitioner Reid's defeat for election as Member of the Board of Selectmen while Petitioner Seymour was elected First Selectman by a razor-thin margin of 17 votes. The prejudice and injury is self-evident.

Having participated in generating harmful publicity during petitioners' campaign for public office, the Commission had a constitutional duty to provide them with a timely opportunity to clear their names. *Barry v. Barchi*, 443 U.S. 55, 66 (1979).

CONCLUSION

Nothing in respondent's brief alters the fact that the Connecticut Supreme Court's majority opinion in *Seymour v. EEC* improperly restricts this Court's decision in *McIntyre v. Ohio Elections Commission* to eliminate application of its First Amendment protection to contested candidate elections; and that the mandatory disclosure requirements of Connecticut's § 9-333w are much too broad; and that the EEC's conduct of this enforcement proceeding in a fashion to contribute to the actual defeat of petitioner Reid as a candidate for local public office clearly violated his due process rights.

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